Vol. 42 (2d Series) AUGUST 17, 1973 No. 2

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(42 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of
the Federal Communications Commission of
the United States

VOLUME 42 (2d Series)

Pages 173 to 290

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

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Washington, D.C. 20402 - on a subscription basis

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F.C.C. 73R-279

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BELO BROADCASTING CORP. (WFAA-TV), DALLAS, TEX. For Renewal of Broadcast License	Docket No. 19744 File No. BRCT-33
WADECO, INC., DALLAS, TEX. For Construction Permit for New Television Broadcast Station	Docket No. 19745 File No. BPCT-4453

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1973; Released July 31, 1973)

BY THE REVIEW BOARD:

1. When the Commission designated this case for hearing (FCC 73-542, released May 24, 1973), it specified against Wadeco, Inc. (Wadeco), a financial qualifications issue pertaining to the number of stock shares issued and subscribed, the relationship of pre-paid expenses to construction costs, the availability of a bank loan, and the source of additional funds sufficient to meet construction and operating costs. Wadeco asks for deletion of all these financial issues, and this is opposed by the Broadcast Bureau and the other applicant, A. H. Belo Corporation.[1]

2. The Board, after studying the pleadings, the Commission designation order, and the various amendments to Wadeco's application to which reference has been made, has concluded that the issues should not be deleted. Petitioner has not shown that its October 12, 1972 amendment, upon which the petition is largely based, was overlooked by the Commission. Rather, as pointed out by the Broadcast Bureau, it appears that the amendment did not satisfactorily resolve the questions raised in the Commission's September 12, 1972 letter; therefore further inquiry at the hearing was needed.

3. Wadeco also disagrees with the fact that the Commission did not accept its bank loan commitment which contained language that the bank "is willing to arrange for a loan." Applicant's disagreement is no grounds for deletion of the issue. Similarly, the request to delete the issue relating to the number of shares issued and subscribed is based on Wadeco's belief that the question posed by the issue "is nonsensical" and of "no conceivable moment"; these contentions do not constitute bases for deletion. The balance sheet entry upon which Wadeco relies

[1] Wadeco filed its petition to delete on June 14, 1973; the Bureau's opposition was filed on June 27, 1973; A. H. Belo's opposition was filed on June 28, 1973; and Wadeco filed a reply on July 10, 1973.

for removal of issue 1(b) concerning pre-paid expenses does not sufficiently clarify this matter to justify the request.

4. On the basis of the foregoing analysis, the Board is unable to find justification for deviating from its general rule of not deleting hearing issues. Accordingly, the petition to delete issues, filed by Wadeco, Inc., on June 14, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-806

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES WITH RESPECT TO THE AVAILABILITY OF TELEVISION PROGRAMS PRODUCED BY NON-NETWORK SUPPLIERS TO COMMERCIAL TELEVISION STATIONS AND CATV SYSTEMS	Docket No. 18179

FIRST REPORT AND ORDER

(Adopted July 26, 1973; Released August 3, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; JOHNSON, REID AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. On May 10, 1968, the Commission released a Notice of Proposed Rule Making (FCC 68-511, 33 Fed. Reg. 7158) proposing a new rule concerning the geographical exclusivity that would be permitted in programming contracts between television station licensees and non-network program suppliers. The proceeding was begun because of complaints of the non-availability of syndicated programs (due to exclusivity arrangements) made by independent UHF stations and because of a resolution on that subject by the Committee for the Full Development of All Channel Broadcasting. The rule, as proposed, reads as follows:

§ 73.659 Territorial exclusivity agreements in non-network program arrangements.

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a non-network program supplier which prevents or hinders another television broadcast station located in a different community from broadcasting the program purchased by the former station. As used in this section, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

2. Several extensions of time were granted in response to a request by the NAB and several other requests by the law firm of Phillips, Nizer, Benjamin, Krim & Ballon representing eight program suppliers; the initial comments were due on February 10, 1969, and the reply comments on March 10, 1969. Comments and reply comments were filed by the following parties:

American Broadcasting Companies, Inc.
All-Channel Television Society (ACTS)
Appalachian Broadcasting Corporation (WCYB-TV)
Columbia Broadcasting System, Inc.

Continental Urban Television Corporation (KGSC(TV))
Covington & Burling (on behalf of 18 television stations)
Fletcher, Heald, Rowell, Kenehan & Hildreth (on behalf of 9 television stations)
General Electric Broadcasting Company, Inc.
Golden West Broadcasters (KTLA(TV))
Greensboro News Company (WFMY–TV)
Gross Telecasting, Inc. (WJIM–TV)
The Hearst Corporation (WBAL–TV)
Herald Corporation (KETV(TV))
Kaiser Broadcasting Corporation
KFIZ Broadcasting Company (KFIZ–TV)
KLOC Broadcasting Company, Inc. (KLOC(TV))
McClatchy Newspapers (KOVR(TV) and KMJ–TV)
Meredith Broadcasting Company
Multimedia, Inc. (WFBC–TV, WBIR–TV, and WMAZ–TV)
National Association of Broadcasters
National Broadcasting Company, Inc.
Northwest Publications, Inc. (WDSM–TV)
Palmer Broadcasting Company (WHO–TV)
WOC Broadcasting Company (WOC–TV)
Pappas Electronics, Inc. (KMPH(TV))
Pierson, Ball & Dowd (on behalf of 13 television stations)
Phillips, Nizer, Benjamin, Krim & Ballon (on behalf of 8 program suppliers)
Sangre de Cristo Broadcasting Corporation (KOAA–TV)
Storer Broadcasting Company
Summit Radio Corporation (WAKR–TV)
Tribune Publishing Company (KTNT–TV)
Triangle Broadcasting Corporation (WSJS–TV)
U.S. Communications Corporation
WGAL Television, Inc. (WGAL–TV and WTEV–TV)
WGN Continental Broadcasting Company
WLVA, Incorporated (WLVA–TV)
WPIX, Inc. (WPIX–TV)

Reply comments were filed by Summit, Kaiser, McClatchy, KLOC and U.S. Communications. Although labeled reply comments, Mid-Continent Television Corporation (WKTO–TV); Iowa Broadcasting Company (KWIG–TV), TVue Associates, Inc. (KVVV–TV); Toledo Telecasting Corporation (WKDS–TV); and Southwestern Ohio Television, Inc. (WSWO–TV) filed comments in the nature of initial comments. Screen Gems filed a statement controverting certain factual statements made in the comments by KLOC. By a reply comment of July 19, 1972, Channel 3, Inc., licensee of KVDO–TV, Salem, Oregon, also commented on this phase of the proceeding. Pappas filed a supplement to comments in opposition on September 19, 1972, and United Television Company of New Hampshire, Inc. (WMUR(TV)) filed a motion to supplement the record on October 10, 1972.

3. On January 18, 1971, the Commission released a Further Notice of Proposed Rule Making (FCC 71–42, 36 Fed. Reg. 935) which en-

larged the proceeding to also consider time exclusivity and to consider the matter as it applies to cable television systems. A Second Further Notice (FCC 72-306, April 11, 1972, 37 Fed. Reg. 7531) set the final dates for comments and reply comments on time exclusivity matters as June 19, 1972 and July 19, 1972, respectively. It also deleted the cable television aspects from this proceeding. The program availability question as it applies to cable television was included in this proceeding because of the Commission's rule requiring cable systems with over 3,500 subscribers to originate programs. It was deleted because of the program availability rules that were adopted by the Cable Television Report and Order issued February 3, 1972, 36 F.C.C. 2d 141. The cable rules adopted in that Report and Order represent our resolution of the problem until a body of experience has been gathered in the cable area concerning program availability. In this First Report and Order, we shall deal with the question of geographical exclusivity for television stations and shall defer action on the time exclusivity aspect of the proceeding because of the severability of the two aspects of exclusivity.

4. The comments generally fall into three general areas, *viz:* (1) outright support of the proposed rule; (2) outright opposition to the rule; and (3) opposition to any rule, but should the Commission find a rule to be necessary the geographical exclusivity should extend some distance beyond the same community (as proposed in the rule) such as to a specific mileage, or within the market area, or to a certain signal intensity contour (e.g. Grade A contour).

5. While specific comments will be set forth where appropriate, the comments will generally be summarized on a topical basis. Comments directly supporting the rule were filed by Summit (WAKR–TV); KLOC Broadcasting (KLOC–TV); KFIZ Broadcasting (KFIZ); Continental Urban (KGSC–TV) and Pappas (KMPH(TV)). Reply comments supporting the rule were filed by Iowa Broadcasting (KWIG–TV); Southwestern Ohio (WSWO–TV); Mid-Continent Television (WKTO–TV); Toledo Telecasting (WDKS–TV); and TVue Associates (KVVV–TV). KGSC–TV, while directly supporting the proposed rule, states that if the Commission finds the proposed rule to be too strict, geographical exclusivity should be limited to 35 miles between the main post offices of the communities. ABC, General Electric and Sangre de Cristo (KOAA–TV) support the philosophy of the rule because it would permit more free competition in bargaining for programming and would minimize abuses as to exclusivity provisions. However, KOAA–TV believes that the "same community" limitation may be too restrictive, and that the rule should permit exclusivity against all stations in cities with which a station has the right to identify.

6. Comments in direct opposition were filed by Meredith, Gross, U.S. Communications, and CBS relying mainly on the great reservoir of programs and the impracticality of any general rule, NAB, NBC, Kaiser, Pierson, Ball & Dowd (on behalf of 13 stations), and Covington & Burling (on behalf of 16 commercial and 2 educational stations) oppose any rule on the theory that any violations can be reached by complaint based on antitrust law and policy. ACTS opposes any gen-

eral rule, stating that the Commission should issue a policy statement outlining its concern over excessive geographical exclusivity when it reaches into another television market (especially a smaller one) and that any abuses could then be handled on a complaint basis.

7. Pierson, Ball & Dowd urge that any general rule would be unworkable, but state that if one must be adopted minimum exclusivity should be permitted through Grade A contour, if substantial overlap does not exist; if it does exist, then exclusivity should be permitted within a 75 mile radius of a station. Hearst (WBAL) and WPIX do not object to a geographical exclusivity rule, but state that a same community exclusivity rule is too stringent. Hearst says that a rule should permit exclusivity within the metropolitan area of the station: WPIX urges that exclusivity be permitted against stations whose transmitters are located within the station's Grade B contour. Herald (KETV(TV)), WGN (WGN–TV), Golden West (KTLA–TV), Palmer (WHO–TV) and WOC (WOC–TV), Appalachian (WCYB–TV), Triangle (WSJS–TV), Greensboro (WFMY–TV), WGAL (WGAL–TV and WTEV–TV), WLVA (WLVA–TV), Multimedia (WFBC–TV, WBIR–TV, and WMAZ–TV), Storer, the law firm of Fletcher, Heald, Rowell, Kenehan & Hildreth (on behalf of 9 television stations) and the law firm of Phillips, Nizer, Benjamin, Krim & Ballon (on behalf of 8 program suppliers) oppose the adoption of a geographical exclusivity rule, but set forth various alternatives if the Commission finds that adoption of a rule is necessary. The following alternatives were set forth: Herald and WGN—against stations whose transmitters are located in a station's predicted Grade B contour: Golden West, Palmer, WOC, Tribune, McClatchy, Northwest Publications, Appalachian, Triangle and Gross—against stations whose predicted Grade A contour would invade a station's predicted Grade A contour: Greensboro, WGAL, WTEV, and WLVA—against stations serving substantially the same market: Multimedia, the law firm of Fletcher, Heald, Rowell, Kenehan & Hildreth and the law firm of Phillips, Nizer, Benjamin, Krim & Ballon—against stations whose transmitters are located in the predicted Grade A contour of a station; and Storer—the Area of Dominant Influence (ADI) as shown in the ARB ratings.

8. The comments supporting the proposed rule rest on the theory that negotiations will be opened and there will be more free competition for the bargaining for non-network programming. ABC, GE. Summit, Sangre de Cristo, and KFIZ state that the pattern of present program distribution would not change greatly, but that programs could be negotiated for and excessive geographic exclusivity abuses would be minimized. They also point out that geographical exclusivity is a problem only where there is overlap of service areas and in these cases the bargaining for programming is most vigorous. The most critical areas are in the overshadowed markets. The "overshadowed" problem is most extensively presented by Summit, the licensee of WAKR–TV, Akron, which is located slightly less than 30 miles from Cleveland. Summit also stresses the point of its objective to serve as an Akron station and does not object to the same programs being shown in Cleveland. Summit, Continental Urban, Iowa, Toledo, Mid-

Continent, TVue Associates, Southwestern Ohio and KFIZ urge that the Commission support the "separate community" theory underlying its Table of Assignments by not permitting geographical exclusivity in non-network program contracts of stations located in one community (usually a larger market) that have the effect of barring even negotiation for a program by a station in another community, especially a smaller community. They point out that, under existing conditions, all that is available for bargaining are the "leftover" programs. KLOC–TV, Modesto, KGSC–TV, San Jose, WMUR(TV), Manchester, New Hampshire, and WAKR–TV set forth several examples of their frustrations in negotiation attempts to secure programming from non-network sources due to geographic exclusivity provisions in contracts by stations located in Stockton, San Francisco, Boston and Cleveland, respectively.

9. The opponents of the proposed rule contend that there has been no showing of a need for the rule, and even if need had been shown, any general rule would be unworkable and impractical because of the unique situations present in every market and contract situation. Some of the various factors present in each contractual situation are the location of the communities, the power and antenna height, geographical terrain, and the presence or absence of other markets. These parties urge the thesis that exclusivity will never be excessive, because exclusivity is an element of the cost in the contract price—a station will buy no more than is needed and a supplier will sell no more since it wants to sell to as many stations as reasonably possible. As set forth in paragraph 6, Kaiser, NAB, NBC, Pierson, Ball & Dowd, and Covington & Burling stress that any abuses in non-network contracts can be clearly reached by existing antitrust laws and policies and that these should be handled on a case-by-case complaint basis.

10. Many of the opponents of the rule urge that the adoption for non-network programs of the rule applicable to network programs [1] is completely inappropriate, because there is simply no analogy between the two situations and types of distribution. It is said that without any understandings with stations, the networks are not going to affiliate with stations close together and having considerable duplication of coverage. This is true, we are told, because they must keep network television a reasonably efficient medium for advertisers, so that it will be competitive with other media, and thus must avoid wasteful duplication. By contrast, it is said, in the case of non-network programs the suppliers have no motive but to sell to as many stations as possible, which they will be free to do if stations are precluded from securing reasonable exclusivity. Thus there is "built-in exclusivity" in one case but not the other. It is said that exclusivity agreements serve the same purpose as the network system, and are necessary if the analogy is to be valid. It is urged that independent stations—already under some handicaps in competing with network-affiliated stations and their popular programs—should not be additionally handicapped by not being able to obtain the degree of exclusivity which the latter obtain

[1] Section 73.658(b) of the Commission's Rules.

the degree of exclusivity which the latter obtain for their network programs. Existing independents, it is urged, should not be penalized for the benefit of "small-market" stations.

11. Other differences are also noted and advanced as reason for different treatment. It is said that network affiliates risk only their time in a network program, and are usually reasonably well compensated for it regardless of whatever duplication by other affiliates may occur; whereas stations procuring non-network programming risk not only time but the large amount of money they must put up to buy the program, a risk which entitles them to reasonable exclusivity with respect to what they have bought. It is asserted that program success is no certainty, so that there is a real risk involved. Moreover, it is pointed out that with network programs the advertising support involved is furnished by and through the network; with non-network programs the station itself must make the effort to sell the time and run the risk of not doing so.

12. The parties contend that without this geographic exclusivity, there will be substantial duplication of programming rather than diversity which is the programming objective stated on numerous occasions by the Commission. This, they state, will in turn act as a deterrent to the creation of new programs. It is also maintained that stations need geographical exclusivity to give certainty to their operations after purchasing a program so that another station will not, during the term of the contract, dilute their audience. These parties contend that exclusivity is sorely needed by the independent stations (especially UHF) to develop and retain shares of an audience within their respective service areas. Kaiser states that a station needs both geographic exclusivity and time exclusivity—geographic, to prevent dilution of audience, and time, to recoup high costs of programming by reasonably resting programs during the contract period. This position is strongly supported by U.S. Communications and others. A number of the parties maintain that there is no shortage of available non-network program materials. Meredith avers that the proposed rule is illegal because it enters into the normal business practices of the industry and would abrogate legal rights of copyright holders and licensees.

13. Most of the comments stress the market concept that governs television broadcasting, i.e., programs are bought to serve a market from which advertising revenues are secured to defray those costs. In the comments that oppose the rule but also set forth an alternative to the same community standard of the proposed rule, the alternatives presented are their respective concepts of the best definition of the television market (which are set forth in paragraph 7, *supra*). Northwest Publications, Appalachian, Triangle, Gross, Greensboro, WGAL, WTEV and WLVA stress that exclusivity should be given against all stations serving substantially the same market and they set forth the specific cities applicable to their respective market situations. Storer contends that the problem is not one of exclusivity, but of price—that is, smaller, near-by stations are simply not willing to pay the price necessary to secure a particular program. Pierson, Ball & Dowd, Kaiser, WPIX and Phillips, Nizer, Benjamin, Krim & Ballon also point out the problem of duplication that would be presented in situ-

ations in which stations use the same or a nearby transmitter site. For example it is stated that Los Angeles stations use Mt. Wilson as their transmitter site, as does the station licensed to serve Fontana (about 60 miles from Los Angeles). Because of this, the Fontana station places at least a Grade A signal into Los Angeles. It is argued that it would be unfair and unrealistic to preclude Los Angeles stations from bargaining for exclusivity over the Fontana station which clearly is in substantial competition with the Los Angeles stations and serves a substantial part of the same audience. Similar situations are pointed out with regard to Philadelphia-Burlington, N.J., and New York City-Linden, N.J.

14. The reply comments of Summit state that the case-by-case approach is not practical and that the alternatives (e.g. Grade A, etc.) will not help the Akron situation. While exclusivity may well help a Cleveland UHF station, it contends it will result in the Akron station's demise. Summit, while recognizing that adoption of the proposed rule is not a "cure-all", believes it would promote bargaining competition for programs. Summit also believes that with the rule, programs may be able to be sold in both Cleveland and Akron at reasonable prices. The reply comments of McClatchy and of Screen Gems (a program supplier) deny statements of KLOC–TV at Modesto that McClatchy and the program suppliers acted in concert to deny programs to KLOC–TV. U.S. Communications, in reply comments, reiterates that it considers KGSC–TV at San Jose to be a competitor of its San Francisco station because of service contours and advertising sales.[2] KGSC–TV submitted a letter from U.S. Communications to a program supplier in which it stated that it would require exclusivity against KGSC–TV and would not consider any program owned by KGSC–TV.

15. Most of the opposition comments rule out the Commission alternatives set forth in the Notice, e.g., percentage of overlap, percentage of duplicated circulation, etc., as being either impractical or unworkable. Kaiser and NBC point out that the sliding scales exemplified by percentage of overlap and duplicated circulation are too cumbersome and nearly impossible to administer in the marketplace. Covington & Burling state that the specific mileage and contour standards do not necessarily reflect a television market.

16. Information submitted concerning exclusivity provisions in existing contracts indicates about every type of geographic provision ranging from same-city exclusivity through exclusivity against stations located in the Grade B contour. It appears that the most common exclusivity given is against stations located in the Grade A contour. (As to time provisions, which we are not here directly considering, it appears that feature films have 5 to 7 years exclusivity, and series not more than two years or a specific number of runs. Specials quite often have only a one-year or one-showing time exclusivity. Usually the film or series contract terminates on the expiration of the contract, but in some cases, the contract terminates upon a specific number of showings of the film or series. In most cases, the contracts were not assignable.)

17. The alternative urged most strenuously is the *ad hoc* concept

[2] U.S. Communications no longer is operating the San Francisco UHF station.

based on complaints, that would rely on antitrust principles as well as other law, rules and policies. An administrative agency, with certain limitations, may proceed either by a general rule or on the case-by-case method. See *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). The most apparent advantage of the use of the *ad hoc* method in situations is that the particular facts of the case may be more fully explored and the specifically needed remedy in the situation may be adopted. Thus, it gives an edge of flexibility not available under a general rule. However, such proceedings are usually very time consuming. We believe the benefit of a simple self-executing rule is more applicable to the situation here where time is such a significant factor. By the time the *ad hoc* proceeding would be completed, the term of the non-network contract might well have expired.

18. As mentioned previously, several of the parties, even though opposing any rule, suggested the alternative of limiting territorial exclusivity in syndicated program contracts as against stations in "the market" or against stations located within a particular signal contour or within the Area of Dominant Influence (ADI). Use of the foregoing standards would create uncertainty in negotiations because of factual disputes concerning the location of the boundaries and because such boundaries would be changing. To avoid these complications we are rejecting these proposed standards.[3]

19. It would appear that one reasonable standard would be the specified zone of a television broadcast station, which is defined as the area extending 35 air miles from the Commission's specific reference point in a given community. The purpose of the specified zone concept is to govern carriage of television signals on a cable system as set forth in the Commission's Rules. (It has no direct connection to the provisions of Section 76.151 which prescribe exclusivity that cable systems must give to non-network syndicated programming which provisions are not based on mileage standards.) Although the 35-mile specified zone has proved a useful standard for cable we are of the view that it would not serve to solve the problems presented to us in this voluminous record as to overshadowed markets. Accordingly, we seek a standard more nearly tailored to the uniqueness of the overshadowed market problem.

20. In addition to rejecting the approaches mentioned in the immediately preceding paragraphs, we regard various other proposals, e.g., permitting exclusivity within a 75-mile radius of a station, as thwarting the objectives of this proceeding, i.e., opening up contract negotiations for syndicated programming. On the other hand, we believe that our proposed rule that would provide exclusivity only as against stations in the same community is unduly restrictive. The standard adopted today, which will operate prospectively,[4] is that geographical

[3] An additional drawback to using ADI as a standard is that some cities, e.g., Akron, Ohio, do not appear in an ADI.

[4] Contracts, arrangements, or understandings that are complete under the practices of the industry prior to August 7, 1973 (publication of this Report and Order in the Federal Register) will not be disturbed. Extensions or renewals of such agreements are not permitted because they would in effect be new agreements without competitive bidding. However, such agreements that were based on the broadcaster's advancing "seed money" for the production of a specific program or series that specify two time periods—a tryout period and a period thereafter for general exhibiting—may be extended or renewed as contemplated in the basic agreement.

exclusivity will be permitted in non-network contracts only against stations licensed to the same community or to a community whose reference point contained in Section 76.53 of the Rules is located within 25 miles of the said reference point of the station entering into the contract. Such a rule will give administrative certainty with regard to programming and economic judgments of stations seeking to purchase programs that are being shown on other stations.

21. The Commission has developed a Table of Assignments for television with the objective of providing a complete television service for the nation based on the priorities set forth in the *Sixth Report and Order*, 1 R.R. (Volume 3) 91:601 at 91:620 (1962). We believe adoption of the geographical exclusivity rule using a 25-mile standard will assist in the implementaion of that nationwide television service. Such a rule will allow the numerous stations more than 25 miles from a TV community to attempt to secure many programs not now available because of exclusivity provisions in contracts.[5] By having a specific mileage criterion, excess geographic exclusivity cannot be secured by contract.

22. The 25-mile standard gives the degree of specificity required and gives stations in the major cities a protected area of approximately 1,900 square miles in any given contract. The Commission believes that this reasonable standard strikes an equitable and readily understandable standard for the use of negotiating non-network contracts. The twenty-five mile standard between reference points will permit geographical exclusivity against adjacent communities and other nearby communities. We hope that this rule will assist the development of a national television service that is envisioned in the Communications Act and the Commission's Rules and policies by the institution of new program distribution techniques. It is further hoped that the competitive bargaining will be based on vigorous competition and that a larger audience will be able to view good non-network programs. This hope recognizes the fact that programs will not necessarily be sold to all stations participating in the bidding competition.

23. The arguments of the opponents of the proposed rule have merit. This is especially true of the need for reasonable exclusivity to protect a station and give incentive to program suppliers to create and develop new programs. We believe the 25-mile standard meets that criterion. Most of the opposition comments rest on the theory that exclusivity is needed throughout the market area. The Commission believes that overshadowed stations some distance from a large community (although located in the same television market) must be permitted to attempt to secure programs contracted to major market stations so that, based on competition, those overshadowed stations have a chance to develop. With regard to possible duplication, it is believed that the parties (competing stations and the program suppliers) will adequately protect their respective interests as to excessive duplication by negotiations. The adopted rule may well promote program diversification to many "fringe area" station audiences.

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[5] In just New York and Chicago, there are approximately 20 UHF channel assignments within 75 miles of those cities, a number of which are idle.

24. The parties contend that the network rule analogy relied on in the Notice is not a proper support for a non-network programming rule (paras. 10–11, *supra*). It is recognized that the creation and distribution patterns of network and non-network programming are different. However, since we have abandoned our proposed "different community" standard, we need not discuss this subject in detail. Suffice it to say that the rule we adopt recognizes the degree of station commitment involved in obtaining non-network programming to the extent it is appropriate; and, like the network rule, which allows fringe area stations to seek affiliations, permits stations in overshadowed markets to negotiate for non-network programming.

25. Some parties urge that exclusivity should run against any station in a community that is a part of a generally recognized hyphenated market. Because the geographic separations of communities in such hyphenated markets may vary from small to quite significant distances, we do not believe that for hyphenated market situations there should be any departure from the 25-mile rule adopted herein.

26. One of the parties raised the point that the proposed rule is illegal. Such a contention is not valid. The Commission is charged with the duty under the Communications Act (Sections 303(g) and 307(b)) of regulating broadcasting in the public interest. Ability to secure programming is a very important factor for a station to be able to render the proper service to a community in the public interest. It is the Commission's duty to create conditions favorable to the development of broadcast stations to operate in the public interest. When possible antitrust or anti-competitive forces in the marketplace render it difficult, if not nearly impossible to operate, it has the duty to act. That is the purpose of this rule enacted under our statutory mandate.

27. In view of the foregoing, and pursuant to authority contained in Sections 4(i), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective September 7, 1973, Section 73.658 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part 73 of the Commission's Rules is amended as follows:

1. Section 73.658 is amended by changing the headnote and by adding new paragraph (m) to read as follows:

§ 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

* * * * * * *

(m) *Territorial exclusivity in non-network arrangements.* No television station shall enter into any contract, arrangement or understanding, express or implied, with a non-network program producer, distributor, or supplier, or other person which prevents or hinders another television station located in a community over 25 miles away, as determined by the reference points contained in Section 76.53 of this chapter, from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person. As used in this subsection, the term "community" is defined as

the community specified in the instrument of authorization as the location of the station.

NOTE.—Contracts, arrangements, or understandings that are complete under the practices of the industry prior to August 7, 1973, will not be disturbed. Extensions or renewals of such agreements are not permitted because they would in effect be new agreements without competitive bidding. However, such agreements that were based on the broadcaster's advancing "seed money" for the production of a specific program or series that specify two time periods—a tryout period and a period thereafter for general exhibition—may be extended or renewed as contemplated in the basic agreement.

F.C.C. 73-759

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 76, SUBPART I, OF THE COMMISSION'S RULES, REGARDING THE CABLE TELEVISION SERVICE, TO ADD NEW SECTION 76.411 LISTING, FOR REFERENCE PURPOSES, EQUAL EMPLOYMENT OPPORTUNITY ANNUAL "REPORT OF COMPLAINTS FILED AGAINST OPERATORS OF SYSTEMS" REQUIRED BY EXISTING SECTION 76.311(d) OF THE RULES

ORDER

(Adopted July 18, 1973; Released July 20, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. Section 76.311(d) of our Rules provides, inter alia, that "All operators of cable television systems shall submit an annual report to the Commission no later than May 31 of each year indicating whether any complaints regarding violations by the operator of equal employment provisions of Federal, State, territorial, or local law have been filed during the preceding calendar year before any body having competent jurisdiction."

2. However, reference to that required annual report was inadvertently not included in Part 76, Subpart I ("Forms and Reports"), of our Rules (since preparation and filing of the annual EEO Complaint Report does not involve the use of a special FCC form, but may be submitted on the cable operator's own stationery). To avoid any possible resultant confusion we have decided to add to Subpart I, a new Section 76.411 drawing further attention to the equal employment opportunity annual "Report of Complaints Filed Against Operators of Systems" required by existing Section 76.311(d). In view of the fact that new Section 76.411 effects no substantive or procedural change in the Commission's Rules, but serves essentially only as a reference to an already-existing requirement, we find that, pursuant to Sections 553(b)(3)(A) and (B) and (d)(2) and (3) of Title 5 of the United States Code, the usual Administrative Procedure Act requirements of a general notice of proposed rule making, and a 30-day waiting period between publication of the new rule and its effective date, do not apply to this rule change.

3. For the reasons set forth in the foregoing paragraph, IT IS ORDERED, pursuant to the authority contained in Sections 2(a), 3(b) and (d), 4(i), 301, 303, and 403 of the Communications Act of

1934, as amended, and Sections 553(b)(3) (A) and (B) and (d) (2) and (3) of Title 5 of the United States Code, that effective August 1, 1973, Part 76 of the Commission's Rules is amended as set forth in Appendix A of this Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX A

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76—Cable Television Service.

In Subpart I, new Section 76.411 is added to read as follows:

§ 76.411 *Annual report of complaints.*

An "Annual Report of Complaints" shall be filed with the Commission for each cable television system, as defined in § 76.5, on or before May 31 of each year, in accordance with the provisions of § 76.311. This report indicates whether any complaints, alleging violations by the operator of equal employment provisions of Federal, State, territorial, or local law, have been filed during the previous calendar year before any body having competent jurisdiction.

F.C.C. 73-792

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice to
THE CHESAPEAKE AND POTOMAC TELEPHONE CO., WASHINGTON, D.C.
Concerning Liability to Monetary Forfeiture Under Section 203(e) of the Act

JULY 26, 1973.

THE CHESAPEAKE AND POTOMAC TELEPHONE CO.,
1710 H Street NW.,
Washington, D.C.

Attention: Mr. W. Eugene Butler, Assistant Vice President.

GENTLEMEN: This letter is a notice of liability to monetary forfeiture imposed under Section 203(e) of the Communications Act of 1934, as amended.

The Chesapeake and Potomac Telephone Company has incurred liability to a forfeiture of $1,000 as a result of its disconnection of telephone service to Mr. Stanley Segal of Bethesda, Maryland for reasons and in a manner not in accordance with the regulations of the American Telephone and Telegraph Company's Tariff F.C.C. No. 263, in which your company is a concurring carrier. Specifically, you admit in your letter of March 1, 1973 that when you disconnected for non-payment the service provided to a subscriber whose name was very similar to Mr. Segal's, you also wrongfully disconnected Mr. Segal's service, which was paid for in full, because you mistakenly believed the debtor was responsible for the service provided to Mr. Segal. Therefore, you disconnected Mr. Segal's service when there was neither a sum due nor any allegations that he was in violation of any of the regulations governing the furnishing of service. We note further that even if the debtor and Mr. Segal were the same individual, as you mistakenly believed to be the situation at the time of disconnection, there is no express tariff authority for disconnecting one service for the non-payment of another separate service. For such disconnection your company is liable for $500. Secondly, Mr. Segal's service was disconnected without written notice as also required in the aforementioned tariff. For failure to provide such notice your company is liable for $500. The total liability is, therefore, $1,000.

You are required to pay the amount of the forfeiture within thirty days of the date of this letter. The forfeiture should be paid by check or money order drawn to the order of the Treasurer of the United

States and should be mailed to the Federal Communications Commission, Washington, D.C. 20554.

You are also notified that the amount of forfeiture paid should be charged to Account 370, Extraordinary income charges, as is required by Section 31.70 of the Commission's Rules and Regulations.

Commissioner H. Rex Lee absent.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

104-005—73——2

F.C.C. 73-774

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Severance by
COMMUNICATIONS RADIO STATION KROQ,
BURBANK, CALIF.
Of Sales Relationship Between Station
KFAC and KROQ

JULY 18, 1973.

GEORGE E. CAMERON, JR., COMMUNICATIONS,
Radio Station KROQ,
224 East Olive,
Burbank, Calif.

GENTLEMEN: This is with reference to the Commission's letter of October 2, 1972, requesting information as to your national sales representative, and your reply of October 17, 1972. You state that your national representative is McGavren-Guild-PGW Radio, Inc., which represents KFAC, Los Angeles, California. The licensee of KFAC states that this sales representative also represents KFAC(FM).

The Commission's files reveal that ASI Communications, Inc., owns all the stock of McGavren-Guild-PGW Radio, Inc. and holds all the stock of Cleveland Broadcasting Incorporated, which latter corporation holds all the stock of KFAC, Inc., licensee of KFAC and KFAC (FM). Therefore, it appears that the licensee of KFAC and KFAC (FM) and the national sales representative for these stations are controlled by the same holding company, and that this national sales representative represents KROQ, an AM station in the Los Angeles area, licensed to George E. Cameron, Jr. Communications.

In *Golden West Broadcasters*, 16 F.C.C. 2d 918 (1969), petitions were filed to deny renewal of license of several stations in the Los Angeles and San Francisco areas. It was alleged that Metro TV Sales, a national spot television sales firm wholly owned by Metromedia, Inc., resigned the representation of Metromedia's own television station KNEW-TV in San Francisco in favor of representing Cox Broadcasting Company's Station KTVU-TV, Oakland, California. Further, it was alleged that Storer Broadcasting Co., licensee of KGBS, Los Angeles, California, and Golden West Broadcasters, licensee of KMPC, Los Angeles, California, jointly owned Major Market Radio, Inc., which was the spot sales representative for KMPC. In its decision the Commission held that the representation of a station by a sales representative owned wholly or partially by the licensee of a competing station in the same community or service area is a violation of longstanding Commission policy proscribing cross-interests by licensees in more than a single station in the same service in the same

areas. The Commission stated that such an arrangement gives the licensee-representative a large stake in the financial well-being of the station it represents and that this relationship militates against competition between the stations. In so stating the Commission reaffirmed its policy as set forth in its letter to Shenandoah Life Insurance Company (19 R.R. 1 (1969)) that actual impairment of competition need not be shown since it is the potential of such impairment which the Commission policy was designed to guard against. The Commission stated that it believed that the relationships established by Metromedia and Storer with another licensee in the San Francisco and Los Angeles areas were antithetical to those policies which are the underpinnings of the multiple ownership rules: the promotion of maximum diversification of program and service viewpoints.

Considering the circumstances in the present case, we believe that the dual representation of Stations KFAC and KROQ to be in violation of the policy set forth in the *Golden West* case.

The question as to whether McGavren-Guild-PGW Radio, Inc., can represent, in these circumstances, KFAC(FM) and KROQ is presently under consideration in a Notice of Inquiry and Notice of Proposed Rule Making as to combination rate practices.

In view of the above, you are requested to inform the Commission within twenty days of the steps you have taken to sever the sales relationship between Station KFAC and KROQ.

Chairman Burch absent.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

F.C.C. 73-782

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORP. Investigation Into Charges, Practices, Classifications, Rates, and Regulations	Docket No. 16070

ORDER

(Adopted July 18, 1973; Released July 23, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has before it for consideration Tariff F.C.C. No. 8 filed pursuant to Special Permission No. 6939 by the Communications Satellite Corporation (Comsat) under Transmittal 216 on June 29, 1973, scheduled to become effective on July 1, 1973 and to expire on September 28, 1973, which offers to authorized common carriers (1) leased voice-grade and television service channels for use in establishing communications paths between the Comsat earth stations at Brewster, Washington or Jamesburg, California and an earth terminal at Juneau, Alaska (Lena Point) and (2) television service channels between the Comsat Talkeetna, Alaska earth terminal and the Lena Point terminal at Juneau.[1]

2. Under the instant tariff, Comsat proposes a monthly rate of $4,000 per circuit. Since both ends of the service are points within the jurisdiction of the Commission, the rate may be broken down into two components: (1) a rate of $1,500 for the "uplink" (between the mainland and a Pacific basin satellite) and (2) a rate of $2,500 for the "downlink" (from the satellite to, but not including, the Juneau terminal).[2] The rate component applicable to the uplink is the same as that for Comsat's existing service to Alaska.[3] The component covering the downlink, however, differs from that in the existing tariff because under the subject tariff Comsat will provide only the space segment portion of the service. Because RCA Alaska Communications, Inc. will provide its own earth station at Lena Point, Comsat alleges that it is necessary to adjust the regular Comsat $1,500 rate for Alaska service. Comsat's standard procedure allocates .6667 of a rate to the space segment and .3333 of it to the earth station. Furthermore, Comsat contends that because the Lena Point station is of less than standard size (a diameter of 32 feet vs. 97 feet for a standard station) and because it will exhibit lower performance characteristics, and "ad-

[1] On June 21, 1973, Comsat filed Application No. 155 seeking special permission to establish, on less than statutory notice, rates applicable to the instant service.
[2] *See* Comsat Application No. 155, at p. 2.
[3] Comsat Tariff F.C.C. No. 1, 13th Revised Page 11AAA.

justment factor" of 2.5 must be applied to the space segment component to compensate for greater portion of available satellite capacity needed to achieve adequate service quality.[4]

3. The rate-making principles and assumptions which Comsat used in developing the rates set forth in Tariff F.C.C. No. 8 are, to a large extent, the same as those it used to develop rates contained in Tariffs F.C.C. No. 1, No. 3, No. 5 and No. 7. Indeed, Comsat makes no attempt to justify the rates herein on any basis other than by reference to its established rate-making procedures. The reasonableness of those procedures is one of the issues currently under investigation in Docket No. 16070. We therefore believe that the investigation in that docket should be expanded to include consideration of the charges, practices, classifications, rates and regulations contained in Comsat Tariff F.C.C. No. 8. Without in any way limiting its scope, the investigation ordered herein should include consideration of the following issue: whether Comsat, which will furnish the space segment capacity between the satellite and the RCA Alascom earth station at Lena Point (Juneau), should separately tariff such charges, and if so, at what rate (in this connection, see *Establishment of Regulatory Policies Relating to Authorizations under Section 214 of the Communications Act of 1934*, 23 F.C.C. 2d 9 (1970), as clarified by Memorandum Opinion and Order, 30 F.C.C. 2d 513 (1971)).[5]

Accordingly, IT IS ORDERED, That the investigation in Docket No. 16070 is enlarged, pursuant to Sections 203, 204, 205 and 403 of the Communications Act of 1934, to include consideration of the lawfulness under Sections 201 and 202 of the Communications Act of 1934 and Sections 201(c)(2) and 201(c)(5) of the Communications Satellite Act of 1962, of Tariff F.C.C. No. 8 of the Communications Satellite Corporation, and any amendments thereof as well as any successive issues of such tariff as may hereafter be made until the close of the record herein.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[4] The downlink rate component was calculated in the following manner:

Guideline rate (a satellite to Alaska earth station)	$1,500
Space segment portion ($1,500×.6667)	1,000
Multiplied by the adjustment factor (2.5×$1,000)	2,500

[5] Although the present tariff proposal has not been challenged by any carrier or customer, we nevertheless believe it appropriate to indicate that a determination of its lawfulness, *ab initio* is appropriate, so that any remedies subsequently found appropriate such as, e.g. refunds, could be entertained as in the case of other Comsat tariffs. See particularly Communications Satellite Corporation, FCC 73–648 released June 27, 1973.

F.C.C. 73R-273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COSMOPOLITAN BROADCASTING CORP., NEWARK, N.J. For Renewal of Main, Auxiliary and SCA License for WHBI(FM)	Docket No. 19657 File No. BRH-1359 BRSCA-746

MEMORANDUM OPINION AND ORDER

(Adopted July 24, 1973; Released July 27, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING WITH STATEMENT IN WHICH BOARD MEMBER PINCOCK JOINS.

1. The Commission designated the application of Cosmopolitan Broadcasting Corporation (Cosmopolitan) for hearing by Order and Notice of Apparent Liability, FCC 72-1137, released December 19, 1972, on numerous issues, including inquiries into alleged violations of Commission Rules 1.615 and 73.282. Presently before the Review Board is a petition to enlarge issues, filed April 2, 1973, by the Commission's Broadcast Bureau requesting addition of Rule 1.514 and misrepresentation issues and inclusion of additional matters under the existing Rule 73.282 (logging rule) issue.[1]

2. The Bureau concedes that its petition to enlarge issues is late filed; however, the Bureau argues that good cause exists for accepting its pleadings. Furthermore, the Bureau asserts that the substance of the requested issues raises serious public interest questions, citing *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 8 RR 2d 611 (1966). Petitioner explains that the matters relied on to support the instant petition only came to its attention recently while it was preparing requests for admissions of facts and responses to interrogatories; also, because of other work commitments, counsel was unable to devote substantial time to this case until recently. Moreover, the Bureau asserts that the questions raised herein, *i.e.*, misrepresentations to the Commission and numerous logging violations, are of a disqualifying nature and so substantial as to require consideration under the Board's holding in *Edgefield-Saluda*.

3. In support of its requests for Rule 1.514 and misrepresentation issues, the Bureau relies upon essentially the same set of facts. The Bureau explains that the Commission specified a Rule 1.615 issue [2]

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[1] Also before the Review Board are following related pleadings: (a) opposition, filed April 16, 1973, by Cosmopolitan; (b) erratum to (a), filed April 17, 1973, by Cosmopolitan; and (c) Broadcast Bureau's reply, filed April 26, 1973.

[2] Designated issue (1) seeks: "To determine whether applicant failed timely to file ownership reports to the Commission in violation of 1.615 of the Commission's Rules."

against Cosmopolitan, in part, because of its apparent failure to advise the Commission that one William A. Masi was given a five percent stock interest in the applicant corporation in a management contract dated June 27, 1962. Although the contract was executed in 1962, and Masi actually acquired the stock on December 22, 1964, the first ownership report (FCC Form 323) advising the Commission of Masi's stock ownership was dated February 25, 1966, the Bureau continues. In preparing requests for admissions of fact, petitioner recites, it checked approximately 14 applications including modifications, renewals, assignments, and amendments filed by Cosmopolitan from the time it filed for a construction permit in 1959 until it filed for renewal in 1966, and in none of these applications did Cosmopolitan divulge the existence of the 1962 management contract or the 1964 transfer of the stock to Masi. In fact, the Bureau alleges, Cosmopolitan affirmatively represented in at least five of these applications that there were no contracts affecting ownership and no ownership changes, and that, in one of them, an application filed April 3, 1964 for assignment of a 50% stock interest to Donald Lewis, Cosmopolitan's principal stockholder, the applicant affirmatively represented that Lewis would be the sole stockholder.[3] These circumstances, the Bureau argues, raise a substantial question as to whether Cosmopolitan misrepresented facts concerning Masi's interest in applications filed with the Commission and whether Cosmopolitan's failure to report the Masi interest in ownership reports also constituted misrepresentation of facts. Furthermore, in light of Cosmopolitan's failure to disclose this interest in the applications indicated above, the Bureau argues that issue (1) should be expanded to encompass Rule 1.514 violations. In support of its request to expand issue (e),[4] the Bureau alleges that Cosmopolitan has violated other subsections of Rule 73.282 in addition to its failure to properly identify the political affiliation of certain candidates which prompted the Commission to designate the issue. The Bureau contends that Cosmopolitan: (1) failed to log at least seventeen political announcements in violation of Section 73.282(a)(4)(ii); (2) failed to identify the persons who paid for some thirty political announcements in violation of Rule 73.282(a)(2); (3) failed to identify by program type as required by Rule 73.282(a)(ii) nine political announcements; and (4) failed to properly make corrections in program logs in accordance with Rule 73.282(d)(1).[5]

4. In opposition, Cosmopolitan asserts that the Bureau's petition was filed more than three months late, and that the Bureau has shown no good cause for its untimeliness. Cosmopolitan maintains that the requested Rule 1.514 and misrepresentation issues center around its alleged failure to report Masi's minority interest in application forms and that the Commission has already designated a Rule 1.615 issue

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[3] The Bureau asks the Board to take official notice of these five applications.

[4] Issue (e) seeks: "To determine whether the applicant failed to make entries in the program logs of WHBI properly identifying the political affiliation of certain candidates for public office in violation of Section 73.282 of the Commission's Rules."

[5] Petitioner explains that it only had time to review Cosmopolitan's program logs for the period of October 1, 1970 through November 3, 1970. The Bureau notes, however, that the Bill of Particulars cites the Station's program logs for other periods, as well, in support of the designated issues.

because of Cosmopolitan's alleged failure to report this same interest in ownership reports. Since the Bureau's instant request for an issue is obviously connected with the designated issue and the facts relied upon by the Bureau could have been determined without detailed study, Cosmopolitan maintains that the Bureau's excuse that its counsel was too busy to devote a substantial amount of time to this case until recently is specious. With respect to Rule 73.282, the Commission has already designated an issue, Cosmopolitan points out, to explore alleged logging violations in connection with political announcements carried on Station WHBI during the 1968 and 1970 general election campaigns. The Bureau's request for additional issues, Cosmopolitan submits, involves logging rule violations allegedly committed during the same 1970 campaign and improper log changes made during the same period: there is no excuse, therefore, why the Bureau could not have ascertained the facts it relies upon to support the instant request prior to the expiration of time for filing a timely petition to enlarge, Cosmopolitan maintains. Furthermore, the Bureau's interpretation of *Edgefield-Saluda*, Cosmopolitan argues, would allow consideration of any untimely pleadings whenever facts are recited which indicate that the Commission's rules may have been violated. *Edgefield-Saluda*, according to Cosmopolitan's interpretation, only applies when the alleged violations are so serious in nature as to require the disqualification of the applicant if they are proved. Cosmopolitan argues that it had no intention of concealing Masi's interest, as is evidenced by the fact that it amended its Ownership Report (FCC Form 323) dated February 25, 1966, to reflect his interest, and that absent allegations of intent, such violations cannot be disqualifying. Furthermore, Cosmopolitan argues, the effect of logging violations on its qualifications to be a Commission licensee is already encompassed within the scope of the Rule 73.282 issue designated by the Commission.

5. The Review Board is of the view that the Bureau has not shown good cause for the untimely filing of its petition to enlarge. The applications and program logs relied upon by the Bureau to support its allegations were available prior to the designation of this proceeding for hearing and no showing has been made that with due diligence the facts relied upon to support the instant requests could not have been discovered earlier, particularly since they relate primarily to subject matters already in issue. See *RKO General, Inc. (WNAC–TV)*, FCC 73R–249, released July 6, 1973. Moreover, with respect to the requested Rule 1.514 and misrepresentation issues, we do not believe the Bureau's allegations meet the test set forth in the *Edgefield-Saluda* case. As the applicant indicates, the Bureau has not alleged any motivation on Cosmopolitan's part to conceal Masi's stock interest and we do not agree that, standing alone, failure to report the creation or transfer of a 5% stock interest in the applicant corporation raises substantial public interest questions in the circumstances of this case. In other words, the alleged omissions are not sufficient to overcome the inherent procedural infirmities, absent a showing that the 5% trans-

fer resulted in a transfer of control of the station.[6] *Cf. Gross Broadcasting Company (KJOG–TV)*, FCC 73–684, released July 6, 1973; *A. V. Bamford*, FCC 73R–259, released July 16, 1973; *Vogel-Ellington Corporation*, FCC 73R–258, released July 17, 1973. In reaching our conclusion, we have also considered the facts that there are already numerous issues inquiring into Cosmopolitan's character qualifications, and that Cosmopolitan's apparent failure to report Masi's interest in ownership reports is already the subject of a Rule 1.615 issue in this proceeding. We, accordingly, believe that the addition of two more issues inquiring into the same subject matter would serve no useful purpose. Finally, with specific reference to the Bureau's contentions regarding misrepresentation, we note that, if the 1962 management contract did not effectuate a transfer of control to Masi, the contract would not have to be reported under Section II of Form 301. *Sumiton Broadcasting Co., Inc., supra.* Accordingly, these requested issues will be denied.

6. However, we do believe that a serious question is raised with respect to the alleged logging rule violations. In this regard, the Bureau has satisfied the test set forth in *Edgefield-Saluda:* the allegations raise serious public interest questions, and are supported by substantial documentation and are not rebutted. Moreover, on the merits, the numerous additional violations alleged are, contrary to Cosmopolitan's assertion, not encompassed within the designated Rule 73–282 issue. The Commission places great importance on the maintenance of accurate program logs. Failure to accurately maintain logs has led to forfeiture, short term renewals and denial of renewal licenses. See *KOKA Broadcasting Co., Inc.*, FCC 71–232, 21 RR 2d 981 (1971); and *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 14 RR 2d 813 (1968), reconsideration denied 17 FCC 2d 485, 16 RR 2d 30 (1969), affirmed 142 U.S. App. D.C. 20, 439 F.2d 580, 20 RR 2d 2126, cert. denied 402 U.S. 904 (1971). In light of the foregoing, we will modify the existing false logging issue to encompass the matters raised herein.

7. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed April 2, 1973, by the Broadcast Bureau, IS GRANTED to the extent indicated herein and IS DENIED in all other respects, and

8. IT IS FURTHER ORDERED, That issue (e) specified in the designation order IS MODIFIED to read as follows:

(e) To determine whether the applicant failed to make entries in the program logs of WHBI properly identifying the political affiliations of certain candidates for public office, failed to log the broadcast of political announcements, failed to identify in the station's program logs the person(s) who paid for political

[6] We note that the Bureau, in paragraph 5 and note 1 of its petition, refers to the facts that the 1963 management contract provides, by its own terms that the 5% transfer of stock to Masi would require prior Commission approval and that such approval was never sought. However, the Bureau does not elaborate on the potentially significant questions of whether the creation of a 5% stock interest in Masi resulted at that time in a transfer of negative control of the applicant corporation from either of the two equal 50% owners or whether Masi's interest combined with the management contract resulted in his acquisition of "swing" control of the corporation. We have in the past expressed concern with an applicant's obligation pursuant to Section II of Form 301 to report contracts or understandings relating to control of the station. *Cf. Sumiton Broadcasting Co., Inc.*, 15 FCC 2d 400, 14 RR 2d 1000 (1968). However, the Bureau has not requested the addition of an unauthorized transfer of control issue, and, absent additional facts, the allegations now before the Board are insufficient to raise a substantial question warranting evidentiary inquiry into this matter.

announcements, failed to make program log entries identifying programs by type, and failed to properly explain and sign corrections to program logs in violation of Section 73.282 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER BERKEMEYER IN WHICH BOARD MEMBER PINCOCK JOINS

I dissent to the Board's refusal to add misrepresentation and Rule 1.514 issues to this proceeding. First, I perceive nothing in the *Edgefield-Saluda* doctrine which would serve to distinguish our treatment of these allegations from those underlying the proposed logging violations issue. Alleged violations of Rule 1.514 and misrepresentations are potentially disqualifying (see *Star Stations of Indiana, Inc.*, 34 FCC 2d 632, 24 RR 2d 165 (1972), *Folkways Broadcasting Company, Inc.*, 33 FCC 2d 632, 23 RR 2d 944 (1972) and the cases cited therein) and, in this case, are substantially documented and unopposed. Secondly, having considered the allegations, I would add a misrepresentation issue in light of Cosmopolitan's conceded failure to disclose Masi's interest in its ownership reports and apparently in several applications filed subsequent to the 1962 management agreement; its affirmative representations in at least five applications filed with the Commission that no contracts affecting ownership and no ownership changes existed; and a representation in one application that Lewis would be the sole stockholder of Cosmopolitan. The Board in numerous instances has added a misrepresentation issue where an applicant has made affirmative representations in Commission forms which appear to be contradicted by other known facts or where the applicant has failed to disclose information of potential decisional significance. See *Voice of Reason, Inc., (KICM)*, 37 FCC 2d 686, 25 RR 2d 645 (1972); *Phil D. Jackson*, 33 FCC 2d 561, 23 RR 2d 622 (1972); *Cathryn C. Murphy*, 30 FCC 2d 568, 22 RR 2d 224 (1971). Finally, I believe it follows that a Rule 1.514 issue is warranted because of Cosmopolitan's apparent failure in several applications filed with the Commission to disclose either the contract agreement with Masi or the subsequent transfer of the stock.

F.C.C. 73-756

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Appeal by
CSA REPORTING CORP.
Concerning Contract for Reporting Services

JULY 18, 1973.

Mr. ROY SMITH,
President, CSA Reporting Corp.,
300 7th Street SW., Washington, D.C.

Re: Disposition of your appeal under contract RC-10169, for reporting services for the Federal Communications Commission.

DEAR MR. SMITH: Your appeal of February 13, 1973, to the final decision of the Contracting Officer of the Federal Communications Commission rendered on January 16, 1973, has been referred to the full Commission for final disposition.

Your appeal is to a final decision of the Contracting Officer that the reporting of Advisory Committee Proceedings of the Federal Communications Commission is within the scope of Contract RC-10169, as extended by option through June 30, 1973. The Contracting Officer determined that the reporting of Advisory Committee Proceedings is within the scope of the contract and negotiation of a separate pricing schedule is precluded thereby.

The contract was awarded under competitive bid procedures to provide stenographic services for both the Federal Communications Commission and the Public. The contract was established as an "exclusive requirements contract" to provide "written transcripts of adjudicatory hearings, rule-makings and other proceedings for which verbatim transcripts are required by law or by rule of the Commission and include but are not limited to hearings, conferences, evidentiary hearings, rule-makings, and court proceedings, oral arguments on pleadings, exceptions, etc., and the motions calendar." Stenographic services are further defined as taking dictation, transcribing the dictation, and preparation of hard copy in the number of pages required.

A requirements contract by its nature is meant to include all requirements for the services contracted for and must be furnished by the contractor and paid for by the Government at the contract rates established therein.

Your position is that the contract covers only proceedings before the FCC and that the term "proceedings" has the limited definition set forth in the Administrative Procedure Act (5 U.S.C. 551(12)). This you say includes rule making, adjudication, and licensing but does not include meetings. The statement of scope of contract includes

language which indicates a broader contract than that definition suggests.

As quoted earlier, the contract covers proceedings for which verbatim transcripts are required by law or by rule of the Commission. It is viewed that such transcripts are required by rule of the Commission when the duly appointed head of a committee determines that transcripts should be taken. The word "rule" is not limited to the published Rules and Regulations adopted pursuant to rule-making procedures and appearing in the Code of Federal Regulations, but is more reasonably interpreted to include orders and directives of the Commission and its officials acting within the scope of their authority.

While the claim is ostensibly grounded upon the contention that Advisory Committee Proceedings were not intended to be included in the contract, it is clear that such meetings were treated by both parties as being included within the contract.

The record indicates that both parties at one time understood the Contract to include Advisory Committee meetings. Under previous Contracts employing similar language, you provided reporting services for meetings of the National Industry Advisory Committee and other Committees from time to time. Although you state that you reported such meetings under the present Contract under protest, there is no record of assertions that they were outside the Contract. A letter the Commission received from you on March 9, 1972, is inconsistent with assertions that advisory committees are outside the Contract. The letter complains generally about difficulties in reporting committee proceedings. Referring to committee meetings in New York, you wrote: "In order to fulfill our obligations under the Contract, it is now necessary for us to send reporting personnel from Washington." Further, in referring to the failure of participants in the meetings to buy copies of transcripts, you wrote: "Is it possible that copies of the record are being furnished to the committee members by personnel unfamiliar with the reporting contract requirements." The records show no assertion of dissatisfaction on your part until the September 20, 1972, letter from you to the Contracting Officer stating that committee meetings were outside its scope. For its part, the Commission indicated its interpretation of the Contract by ordering transcripts of committee meetings under its provisions and by not providing other reporting services for meetings it had reason to anticipate, albeit in smaller numbers.

The nub of the matter is that there was disappointment in the number of transcripts of these meetings that were sold. The general rule of law concerning requirements contracts appears to be relevant in this respect.

The rule is that the parties remain bound despite wide variation from the expected or estimated quantities.

In a case in which the Government went past its estimated requirements by over 500 percent, the Comptroller General concluded that there was no legal basis for either reforming the contract or for granting relief to the contractor by an increase in price for any of the units ordered and furnished to the Government. See 47 Comp.

Gen. 365 (1968). The Comptroller General stated therein at pages 370–371:

> "Under a requirements contract, such as here, where the contract provides that the quantities mentioned are estimates only and the measure of goods to be ordered must be the needs of the buyer, the courts have held that there may be substantial variation from the estimates as long as the buyer acts in good faith. *Brawley* v. *United States*, 96 U.S. 168; *James D. Walters* v. *United States*, 131 Ct. Cl. 218; *Shader Contractors, Inc., et al* v. *United States*, 149 Ct. Cl. 535; *Standard Magnesium Corporation* v. *United States*, 241 F. 2d 677; and 37 Comp. Gen. 688.
>
> "See, in particular, the case of Carstens Packing Co. v. United States, 52 Ct. Cl. 430, where the plaintiff entered into a contract with the United States for the delivery at the Puget Sound Navy Yard of 165,000 pounds of meat, more or less, with the provision that the quantities called for in the contract were only estimated and the right was reserved to exact more than the amount at the contract price, or to accept less than the full amount, as the needs of the public services might require. After the contract was executed, the price of meats increased and after the contractor had delivered, under protest, about 900,000 pounds of meat, it sought the aid of the court to recoup its pecuniary losses. The court held that the contractor was not entitled to any monetary relief and that it was required to furnish the quantities determined by the Chief of the Bureau of Supplies and Accounts of the Navy Department as necessary to the needs of the public service.
>
> "With regard to your request to reform the contract because of an alleged mutual mistake of the parties in estimating the quantity of power supplies to be procured under item 12, there is no legal justification for such action here. Reformation of an instrument must be predicated upon the mutual mistake of the parties, as where the contract, as finally drawn, does not reflect the actual intent of the parties and it is established clearly what the contract actually was or would have been but for the mistake. See 30 Comp. Gen. 220; 26 id. 899; 37 id. 688; 20 id. 533. The purpose of reformation is not to make a new agreement between the parties, but, rather, to establish the already existing one. In order to justify the reformation of any instrument, the mutual mistake must have been in drawing the instrument and not in making the contract out of which it grew or which it evidences. See 76 C.J.S., Reformation of Instruments, § 25(c), and authorities there cited."

It does not matter, in a requirements contract, whether the actual requirements exceed or are less than the estimated amount. In a requirements case in which trash actually removed by the contractor was over 100 per cent greater than the Government's estimate, the Comptroller General stated:

> "Under the specific terms of the contract, the Government has a right to receive all the service required to complete the work,

whether those services exceed, or are less than, the estimated amount. The contractor must be held to have assumed the risk that the Government's requirements might exceed the estimate. See 37 Comp. Gen. 688. In like manner, had the actual requirements in this case been less than the estimates, the Government would have assumed the risks thereof and could not later be heard to raise objections to the contractor's good bargain."

B–143438, page 3, September 9, 1960. See also B–169037, May 4, 1970, and B–168766, August 5, 1970, issued by the Comptroller General of the United States.

Based upon the foregoing, by direction of the full Commission, it is determined that reporting of Advisory Committee Proceedings is within the scope of the contract and that your appeal for additional funds is denied.

Chairman Burch absent.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-753

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of H. EDWARD DILLON, RECEIVER (ASSIGNOR) and SARASOTA RADIO CO. (ASSIGNEE) For Assignment of Licenses of Radio Stations WQSA and WQSR(FM) (Formerly WSAF-AM-FM), Sarasota, Fla.	BAL-7599 BALH-1679

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1973; Released July 16, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

The Commission has before it the above entitled applications for assignment of licenses of WSAF-AM-FM,[1] Sarasota, Florida which were granted by the Commission on March 7, 1973 and a timely filed Petition for Reconsideration of that action filed by Charles A. Stewart, together with opposition pleadings filed by the assignee and the assignor.

2. During the pendency of the WSAF assignment application, Petitioner had requested the Commission to either withhold action on the application until the Florida courts adjudicate certain pending suits which contained allegations of impropriety in the appointment of assignor as Receiver of the WSAF stations or to conduct a hearing to determine if the receiver conspired to commit fraud in this matter. Documents and pleadings regarding these suits were submitted to the Commission. On January 27, 1973 Petitioner filed in the circuit court in and for Sarasota County, Florida a "Motion to Stay Receiver's Efforts and Closing" in which Petitioner requested the court to stay the Receiver's authority to prosecute the application before this Commission and the closing of the proposed station sale. In that Motion, Petitioner pointed out that at issue in the pending cases, Nos. 71-982, 71-983 and 71-1552 before the Florida courts is *inter alia*,

> "Whether the appointment of the current receiver of the Stewart Broadcasting Company was the calculated result of a conspiracy to perpetrate a fraud upon the court and to convert to the use of the receiver and others the assets and the stock of the corporation, and the outstanding licenses for the two stations. . . ."

[1] On March 12, 1973, the Commission authorized the change in call-letters of WSAF-AM-FM to WQSA and WQSR(FM). To prevent confusion, in this document we shall continue to refer to the stations as WSAF-AM-FM.

Despite the allegations of fraud and the claims of irreparable harm if the sale were allowed to go through, the Court issued an Order on February 5, 1973 denying the said Motion. By Order of the same date in Case Nos. 71–982 and 71–983 "the court having heard and considered the evidence presented and the arguments of counsel and being otherwise fully advised in the premises . . . ", authorized the Receiver "to accomplish the closing" as soon as is feasible after approval by the Federal Communications Commission.

3. By letter dated March 7, 1973 we notified Petitioner of our decision to grant the application—stating in part as follows:

> Review of the submissions by you and the applicants reveals the following: 1. Prior to the submission of the above-referenced letter, [requesting the withholding of action on the WSAF applications] the question of fraud in the appointment of the receiver, Mr. Dillon, has been litigated, in interlocutory actions, four times through the appellate level of the Florida courts. In each instance the courts' decisions were adverse to your claims.
> 2. On February 5, 1973 your request to stay or restrain the closing of the transaction was also denied [by the Florida court].

In short, the Florida courts have already ruled against you four times with regard to your allegations that the appointment of Mr. Dillon was through fraud. Further, the Florida Court itself has refused to restrain the parties from consummating this transaction. In addition, on the same day the court authorized the parties to consummate this transaction immediately following approval by the Commission. In light of the above, we do not believe the public interest would be served by further delaying consideration of the subject applications."

4. In the Petition for Reconsideration, Petitioner claims in that "the appeals were from interlocutory matters and not from any action constituting a determination of the fraud issue on its merits" and, accordingly, that the fraud issue has not been adjudicated and is still pending in the trial court. In support of these contentions, Petitioner includes an affidavit from Gerald C. Surfus, a member of the Florida Bar, which contains his legal opinion that neither the Trial Court nor the Appellate Court has decided the issue of fraud. Petitioner contends that, with such fraud charges unresolved, the Commission could not validly conclude that grants of the applications were in the public interest. Petitioner also contends that the court's denial to stay the transaction is not an adjudication of the fraud issue but rather "a finding that no threat of irreparable injury was shown." Petitioner charges that the Commission erred in failing to make its own determination on the fraud question or to withhold action pending adjudication of the question.

5. We have carefully reviewed all of the material before us in the light of the contentions in the Petition for Reconsideration and we conclude that Petitioner has submitted no new information and has made no showing which requires the reversal of our earlier decision. The questions of the propriety of the appointment of Mr. Dillon as receiver and of his actions have been before the Florida Courts including the Circuit Court which has jurisdiction over the receivership. This court has refused to grant Petitioner's request for stay of

the Receiver's authority to prosecute and close the WSAF transaction. Moreover, in the face of Petitioner's charges, in cases Nos. 71–982 and 71–983, that court specifically authorized the Receiver to close the sale and the sale was closed on March 9, 1973. In these circumstances the Commission would not deem it proper to institute any independent inquiry into the propriety of the receivership. The question of such propriety is for the court which has jurisdiction over the receivership, and here the Court of competent jurisdiction has specifically authorized the closing of the WSAF sale. Since Petitioner's allegations of fraud were at issue before the court in the cases where the closing authorization was given, it would appear that Petitioner's charges of fraud have been considered and rejected by that court.

6. In view of the existence of suits contesting the receivership which contain allegations of fraud in the appointment of a receiver, the Commission, in deciding whether to withhold action on the WSAF applications had to make a determination of the degree of substance to the fraud charges and weigh this determination against the public benefits of the early resumption of full service by these stations in the hands of a qualified buyer. In assaying the substance of these charges we quite properly took notice of the courts' actions in the cases which contained the charges. The Florida Courts had denied Petitioner's interlocutory appeals, had denied Petitioner's stay request and had specifically authorized the close of the transaction in the face of Petitioner's fraud charges. While these court actions may or may not constitute a final adjudication of the fraud question, in the context of all the information before the Commission, they provide the Commission with sufficient bases for determining that the request for further delay in our action on the WSAF applications was not warranted. This is especially so in view of the fact that Petitioner's request and the material filed in support of it contained mere bare allegations.

7. In view of all the above the Commission has concluded that the contentions and arguments in your Petition do not warrant a reversal of our March 7th grant of the WSAF assignment applications. Accordingly, your Petition IS HEREBY DENIED and the grant of the WSAF–AM–FM assignment applications is hereby affirmed.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

42 F.C.C. 2d

104-005—73——3

F.C.C. 73–789

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ELECTRONIC FUTURES, INC., 527 DODGE AVENUE, NORTH HAVEN, CONN. Petition for Reconsideration of Action Denying Petitions To Show Cause To Be Directed Against Electronics Futures, Inc.

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released July 27, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT; COMMISSIONER WILEY NOT PARTICIPATING.

1. The Commission has before it a Petition for Reconsideration filed on March 1, 1973, by HC Electronics, Inc. (HC) addressed to the Commission's action adopted on January 23, 1973 and released on February 1, 1973, that dismissed Petitions for Order to Show Cause filed by HC to be directed against Electronics Futures, Inc. (EFI); an Opposition to Petition for Reconsideration filed on March 14, 1973, by EFI; and a Reply to Opposition filed by HC on March 23, 1973.

2. In its Petition for Reconsideration, HC asserts that the Commission's dismissal of HC's petitions was premature. In its Opposition to Petition for Reconsideration, EFI disagrees and states that a possible competitive advantage is sought by HC in attempting to delay the timely resolution of this matter. In its Reply to Opposition HC reasons that it would be less of a burden on the administrative process to keep this proceeding open than to start a new one and to repeat the entire pleading process.

3. We have examined the pleadings herein and believe that no reason exists to reopen this matter. Accordingly, the Petition for Reconsideration, filed by HC Electronics, Inc., is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-763

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Proposal by
ELEVEN FIFTY CORP., LOS ANGELES, CALIF.
Concerning Combination Rates Re Stations KIIS and KWST-FM

JULY 18, 1973.

ELEVEN FIFTY CORP.,
Radio Station KIIS,
4015 Wilshire Boulevard,
Los Angeles, Calif.

GENTLEMEN: This is with reference to the letters of October 13, 1971, and June 1, 1972, filed by your attorney on behalf of KIIS and KWST(FM) proposing the use of combination rates, your letter of September 20, 1972, stating that you had commenced using combination rates on October 4, 1971, and your letter of December 19, 1972, stating that you had discontinued the use of combination rates.

By letter dated October 13, 1971, an inquiry was made by your attorney as to the possibility of an AM station and an FM station establishing an arrangement whereby they would allow a discount of ten per cent to an advertiser who purchased time on both stations. Among other things, he stated that the Commission's Public Notice of 1963 concerning combination advertising rates was not applicable inasmuch as the two stations involved were in different services. In a reply of October 29, 1971, the Commission's staff requested more information about the proposal, including the call signs of the stations, and stated that it would be necessary to present the request to the Commission. Your attorney responded by letter of June 1, 1972, giving additional information and reiterating that he did not believe that the proposal was in conflict with the policy as to combination rates.

The Commission received information that advertisements for KIIS and KWST(FM) in the August 1, 1972, publication of Standard Rate and Data Service, Inc. indicated that the two stations used combination rates, and the Commission made inquiry on August 30, 1972, as to whether the two stations were using combination rates, and, if so, when the practice commenced. In a reply of September 20, 1972, you acknowledged using combination rates beginning October 4, 1971.

When inquiry was first made about the use of combination rates, you were using combination rates but did not disclose the fact and even when you were informed in October 1971 that it would be necessary to present the request to the Commission, you failed to disclose that you were continuing to use combination rates. In fact you did not reveal the practice until inquiry was made and even then continued

the practice apparently until December 19, 1972, when you stated that you had discontinued the practice.

The Commission expects licensees to make complete disclosures of pertinent information on matters such as this, and if there is some question as to interpretation of Commission Rules or policies, a licensee is expected to obtain an interpretation from the Commission before commencing a practice which is questionable. Your failure to disclose this information and use of combination rates under these circumstances does not meet the standards expected of licensees, and this matter is being made a part of the files for the station.

In regard to the proposal it appears that the two stations will be priced separately as well as jointly, allowing an "advertiser to combine frequency of equal number of spots on each station" thus qualifying it for an additional discount of approximately ten per cent, and that you will bill advertisers jointly. You state that the music of the two stations is sharply different and that neither will duplicate any programming of any kind; that the two licensees will have no common non-broadcast interests; that they will be managed separately, programmed separately, engineered separately, and sold separately except for the joint sales; that each will retain its exclusive identity, and that each licensee will process each contract for joint sales.

In support of the request, you assert that KIIS has been unprofitable since commencing operation in April 1970 with a total loss of over $1,600,000, that KWST(FM) has had a history of losses and even now is only "slightly profitable", and that the combination sales arrangement will assist both stations to operate in the public interest. You maintain that the public will be benefited by extended programming resulting in increased economic benefits to both stations, that advertisers will benefit from simplified unified paper work, and that the stations will be able to compete more equitably in a market dominated by stations licensed to large national companies. You contend that the joint arrangement "will have minimal, if any, adverse economic effect on the lower-rated stations in the market inasmuch as it is anticipated that the economic benefit, if any, from the proposed station combination will accrue at the expense of the highest rated stations in the market," and you assure the Commission that neither station will enter into any agreement with other stations to extend the combination. Further you contend that the combination agreement is in the public interest in view of the particular market, i.e. the second in the country "served by approximately 35 AM and 35 FM stations and at least 10 commercial television stations, that the 1963 Public Notice concerning combination advertising rates is not applicable since the two stations are in different services, and that the magnitude of the market and other stations make any question of concentration of media even less than academic." You state that other stations in Southern California are sold in combination, and you attached a list.

We have carefully considered your entire request including your arguments that the stations are in separate services, that the stations have not been profitable, that the stations will be operated separately

otherwise, and that you are licensed to the second largest market and must compete with a number of combination owners, and we are not persuaded to grant the request. We do not agree that our 1963 Public Notice is not applicable in this case. As we stated in the Public Notice, combination rate agreements or practices by independent stations serving the same area raise serious questions under the policies underlying the antitrust laws (15 U.S.C. 1), conflict with established Commission policy, and are contrary to the public interest. Stations KHS and KWST(FM) are independently owned stations licensed to the same city, and this policy is applicable to all independently owned stations whether they are in the same service or different services.

It appears from your list of stations in Southern California, which you state are sold in combination, that most were commonly owned stations or stations separately owned but in different cities, except for one combination. Commission inquiry disclosed that this one combination of independent stations in the same city has discontinued the combination arrangement.

In regard to the offering of combination rates by a licensee of more than one broadcast station in the same area, the Commission has taken the position that such practices are not contrary to the public interest if the rate arrangement offered is voluntary (i.e. there is no requirement that the advertiser in order to place advertising on one station also must buy time on one of the licensee's other stations) and if the practice is not employed to advance unfairly a competition position. See *Indianapolis Broadcasting, Inc.*, 22 FCC 421; *WBBF, Inc.*, 24 FCC 179 (1958), affirmed 266 F. 2d 922 (1959), cert. denied 361 U.S. 822. However, the Commission has recently issued a Notice of Inquiry and Notice of Proposed Rule Making seeking information, among other things, as to whether it should continue to permit such combination rates.

In view of the foregoing we cannot approve your request for use of combination rates.

Chairman Burch absent.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

F.C.C. 73-692

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.593 OF THE COMMISSION'S RULES WITH RESPECT TO USES OF FM MULTIPLEX CHANNELS OF NONCOMMERCIAL EDUCATIONAL FM STATIONS INVOLVING A CHARGE TO THE AUDIENCE	Docket No. 19078 RM-1623

REPORT AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. On November 4, 1970, responding to a petition filed by Educasting Systems, Inc. (Educasting), we issued a Notice of Proposed Rule Making in the above-entitled proceeding, in which we proposed to amend Section 73.593 of our rules to permit a noncommercial educational FM broadcast station, subject to appropriate safeguards, to accept payment of tuition fees for educational courses and other appropriate material broadcast on a multiplex basis pursuant to a Subsidiary Communications Authorization.

2. The petitioner was particularly interested in furthering the use of an instructional system utilizing multiple subcarriers, which it had developed and tested on an experimental basis, in which students with especially equipped receivers might listen to an instructor on one subcarrier and choose answers to questions posed by the instructor by depressing one of several buttons, each of which select other subcarriers carrying material appropriate to the correctness of the chosen answer. However, the proposition presented is of general application—whether a noncommercial educational FM station appropriately may charge "tuition or course fees" in connection with the kind of program material authorized to be broadcast over its subcarrier.

3. The Commission made a tentative finding "that to some degree the type of operation proposed by Educasting, or the transmission of instructional types of programs on one or more subcarriers by a noncommercial educational FM station for a fee, could be conducted without undue "commercialization" of the educational FM service, and would be in the public interest; and offered for comment an amendment to Section 73.593 of its rules. The amendment to subparagraph (a)(1) of this Section, with new or modified provisions underlined, is set forth below:

§ 73.593 Subsidiary Communications Authorizations.

(a) * * *

(1) Transmission of programs which are noncommercial and in furtherance of an educational purpose, and which are of a broadcast nature but of interest primarily to limited segments of the station's audience. Illustrative services include: programs for presentation in classrooms; programs designed for special professional groups such as doctors, *lawyers and engineers; materials designed for special interest groups, including those of ethnic, safety and technical orientations and the handicapped;* and any use which would be permitted for a commercial FM station under § 73.293(a)(1), subject to the prohibitions against commercial operations and limitations as to purpose contained in this section and in § 73.503. *Uses under this subparagraph will not be considered "commercial" if there is charged either a per-course or per-pupil fee, where: (a) the material is presented by or for a bona fide educational institution; or if it is not, the licensee of the noncommercial educational FM station has investigated the material and deems it to be clearly of educational or public service value; (b) the payment is made to the educational institution or the noncommercial educational FM stations; and (c) the payments retained by the station licensee total no more than the approximate cost of conducting the SCA operation (including purchase or lease of equipment, course material, etc.) and general overhead and operational costs incidental to it. Where the material is presented by or for an educational institution, or other entity, the payments made to the station or directly to the institution or entity may also include the usual tuition fees charged for similar material presented otherwise.*

The modifications incorporated in the rule are for the purpose of insuring that the material broadcast for a fee, whether prepared by an educational institution, or not, is of an appropriate nature for educational SCA transmission, that the fee payment is made to the educational institution or other entity or to the station, and that the funds retained by the station licensee will not exceed the actual costs incurred by the station in the presentation of the program material.

4. Comments and reply comments, timely filed within the specified deadlines for those pleadings, of December 16, 1970, and January 6, 1971, respectively, were submitted by the following parties:

Comments

Bay Area Educational Television Association (KQED–FM)
Corporation for Public Broadcasting (CPB)
West Virginia Educational Broadcasting Authority
National Association of Educational Broadcasters (NAEB)
Educasting Systems, Inc.

Reply Comments

Educasting Systems, Inc.

5. All of those commenting support an amendment of the rules of the nature proposed, but certain of the parties take some exception to the specific language employed.

6. CPB notes that in stipulating that fees may be charged "per course or per pupil" the proposed rule may be interpreted as allowing such fee imposition only "for SCA services constituting formal instruction", even though other language in the rule which requires that program material be "clearly of educational or public service value" suggests that the charging of fees for a broader range of services is permitted. It is CPB's conviction that SCA operation has great potential for the provision of program services designed for

special interest groups, such as the blind, the aged, or other social, ethnic or minority groups, but that the potential is unlikely to be realized fully unless licensees are able to recover the costs incidental to SCA operation.

7. To clarify what it believes to be the intention of the proposed rule, to which it subscribes, CPB suggests that the portion of the text of the rule which states that "Uses under this subparagraph will not be considered 'commercial' if there is charged either a per-course or per-pupil fee . . ." be revised to read "Uses under this subparagraph will not be considered 'commercial' if there is charged a per-course, per-pupil or other fee. . . ."

8. NAEB notes that while the last sentence of the proposed rule recognizes that the broadcast material may be presented by or for an educational institution *or other entity*, and payments may be made to the institution or *entity*, the alternative represented by the underlined language is omitted from subparagraph (b) of the proposed rule, i.e., for consistency's sake, that (b) should be made to read "the payment is made to an educational institution *or other entity* or to the noncommercial educational FM station. . .".

9. The modifications suggested by CPB and NAEB are for the purpose of making more clear that the SCA program material for which a fee is charged need not necessarily be prepared by an "educational institution" if it is of educational or "public service value". The latter term causes the West Virginia Educational Broadcasting Authority some difficulty. It believes that while the educational station licensee would have little difficulty in determining whether a program offering has "educational value", "public service value" is an ill-defined term, and its employment as an alternative test of the eligibility of particular course material for the imposition of fees "could well be a source of abuse". It therefore suggests that this term be stricken, so that the sole criterion to be applied in determining whether a fee may be charged for program or course material, whether furnished by an educational institution or not, will involve the assessment of its "educational" value.

10. The comments strongly support rule amendments which would permit the imposition of charges for a rather broad range of services presented over the subcarrier of the noncommercial educational FM station. The rule which we are adopting is framed in accordance with this approach. However, on further consideration of all of the factors involved, we have found it necessary, if the public is not to be misled as to basic nature of the program material for which it is being asked to pay, that a clear distinction be drawn between those offerings prepared, sponsored, and supervised by an educational institution, constituting formal instructional or institutional credit material, and those programs which, while they may be of considerable value to their intended audience, do not have the imprimatur of an educational institution.

11. Accordingly, without limiting the freedom of action of the station to make charges for appropriate program material, we have

redrafted the proposed rule to establish the distinction described above, and to require that the noncommercial educational FM station make clear for prospective subscribers to a program series or course of instruction the instrumentality primarily responsible for its preparation and presentation.

12. Since the rule which we are adopting differs substantially in structure from the one we had proposed, the specific changes in wording in the proposed rule suggested by the parties no longer has pertinence. However, we believe that the rule, as now revised, by establishing a separate category of programs, not presented under the auspices of an educational institution for which a charge may be made, provides the clarification of intent which the parties sought to achieve by their suggested changes.

13. Accordingly, IT IS ORDERED, That, effective August 13, 1973, Part 73 of the Rules and Regulations IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. Section 73.593(a)(1) is amended to read as follows:

§ 73.593 Subsidiary Communications Authorizations.

(a) * * *

(1) Transmission of programs which are noncommercial and in furtherance of an educational purpose, and which are of a broadcast nature but of interest primarily to limited segments of the station's audience. Typical services may include: programs for presentation in classrooms; programs designed for specific professional groups, such as doctors, lawyers, and engineers; programs intended to serve the special needs and interests of the aged, the handicapped, particular social and ethnic groups, and for those in a specific trade or sharing a common interest or hobby; programs for individualized remedial or advanced learning needs; and any use permitted for a commercial FM station under § 73.293(a)(1), subject to the prohibition against commercial operation and the limitation as to purpose contained in this section and in § 73.503, such limitation especially including those non-instructional services customarily provided by commercial firms. Uses permitted under this subparagraph will not be considered "commercial", when charges are made for the service rendered, under the circumstances and subject to the conditions set forth hereunder:

(i) A per-course, per-session, per-seminar, per-pupil or other appropriate fee is charged for formal or informal instructional material, presented by, with or for a *bona fide* educational institution. Payment of the fee shall be made to the noncommercial educational FM station or to the education institution; such fee may include, in addition to the station expenses detailed in (iii), below, the usual tuition charged for similar material presented by other means.

(ii) A charge is made for a program or series of programs, informational or generally instructional in nature, intended to meet the special needs and interests of one or more of the groups the station is authorized to serve under its SCA. Payment of the charge shall be made to the noncommercial educational FM station.

(iii) Payments retained by the station shall total no more than the approximate cost of conducting the SCA operation (including purchase or lease of equipment, course material, personnel services, etc.) and the general overhead and operational costs attributable to such operation.

(iv) A noncommercial educational FM station offering program material subject to fee or other charge shall clearly indicate in any broadcast or printed solicitation to prospective enrollees whether the material falls into category (i) or (ii), above, so that informational and general educational materials are not represented as formal instructional or institutional credit programs.

* * * * * * *

F.C.C. 73-803

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (LYONS, KANS.)	Docket No. 19735 RM-1883

REPORT AND ORDER

(Adopted July 26, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. On May 9, 1973, the Commission issued a Notice of Proposed Rule Making (FCC 73-489, 38 Fed. Reg. 13386) in the above-entitled matter, proposing the substitution of Channel 291 for Channel 288A at Lyons, Kansas. The proceeding was instituted on the basis of a petition filed by Rice County Broadcasting Co., Inc., licensee of Station KLOQ(FM), Lyons, Kansas. Station KLOQ is presently operating on Channel 288A which is the sole assignment in Lyons. Interested parties were invited to comment on the proposal on or before June 22, 1973, and could reply to such comments on or before July 3, 1973. There were no oppositions to the proposal. Supporting comments were filed by petitioner.

2. Lyons, population 4,355, is the seat of Rice County, population 12,320.[1] There are no standard broadcast stations in Rice County.

3. Petitioner points out that it desires to switch from a Class A to a Class C assignment so that it may increase the power and antenna height of its station (KLOQ) to enlarge its present service area. It maintains that the increased coverage is necessary for competitive position in the market, and if the switch is made, it immediately intends to increase power to 25 Kw and tower height to 500 feet. It contends that based on the FCC method of prediction of service, this increase in facilities would bring a first FM service to 193 people and a second to 23,374. Preclusion areas occur in the co-channel and five of the six pertinent adjacent channels as a result of the assignment of Channel 291 to Lyons. However, most of the communities located within these areas either have or can be assigned FM broadcast channels. In supporting comments, petitioner states that through a number of carefully planned steps over a period of years as the audience responds to this new medium, he intends to build Station KLOQ to 100 Kw circular polarization with a tall tower.

4. The Commission would ordinarily assign a Class A channel to a community the size of Lyons, but under the above circumstances the

[1] Population figures cited are from the 1970 U.S. Census.

proposal to substitute Channel 291 for Channel 288A at Lyons, has public interest value and is worthy of adoption, in our view, because it is a reasonable means to provide a first and second FM service to 193 and 23,374 persons, respectively. Since Channel 291 can be assigned to Lyons and used at the present site without any other changes in the Table and in full conformity with all spacing requirements, we believe it should be granted.

5. The authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

6. Accordingly, IT IS ORDERED, That effective September 7, 1973, the Table of FM Assignments (Section 73.202(b) of the Rules) IS AMENDED with respect to the city listed below as follows:

City:	*Channel No.*
Lyons, Kans.	291

7. IT IS FURTHER ORDERED, That effective September 7, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by Rice County Broadcasting Co., Inc., for Station KLOQ(FM), Lyons, Kansas, IS MODIFIED to specify operation on Channel 291 in lieu of Channel 288A subject to the following conditions:

(a) The licensee shall inform the Commission in writing by no later than September 27, 1973, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by September 7, 1973, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station KLOQ(FM) on Channel 291 at Lyons, Kansas.

(c) The licensee may continue to operate on Channel 288A under its outstanding authorization until it is ready to operate on the new frequency. Ten days prior to commencing operation on Channel 291, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 291 until the Commission specifically authorizes it to do so.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-802

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (MARION, ILL.)	Docket No. 19732 RM-1946

REPORT AND ORDER

(Adopted July 26, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under consideration its Notice of Proposed Rule Making adopted May 3, 1973 (FCC 73-465, 38 Fed. Reg. 12757), inviting comments on a proposal to substitute Class B Channel 297 for Channel 296A at Marion, Illinois, and substituting Class C Channel 238 for Class C Channel 297 at Poplar Bluff, Missouri. This proceeding was instituted on the basis of a petition filed by 3-D Communications Corporation ("3-D"), licensee of Station WDDD(FM), which operates on Channel 296A. Interested parties were invited to comment on the proposal on or before June 14, 1973, and could reply to such comments on or before June 25, 1973. There were no oppositions to the proposal. Supporting comments were filed by the petitioner.

2. Marion has a population of 11,724 and is the seat of Williamson County (population 49,021).[1] In addition to FM Station WDDD (FM), Marion has a daytime station, WGGH. The only other broadcast station in the county is a Class IV fulltime AM station located at Herrin, Illinois.

3. Petitioner points out that the southern Illinois area is undergoing a rebirth of industrialization and growth and indicates that this growth will cause a tremendous increase in population. 3-D contends that a Class B station is needed to serve the area south of Marion which is extremely hilly and would provide service that does not require special receiving equipment. It states that it would be able to extend the station's coverage to a large area not now served and which is in need of additional radio service. 3-D indicates that because of the increase in population the station would serve (3-D estimates an increase to 250,000 persons from the current 75,000) and would be able to operate on a 24-hour-per-day basis. In order to substitute Channel 297 for Channel 296A presently assigned to Marion, Illinois, and licensed to petitioner, it would be necessary to substitute Channel 238 for Channel 297 at Poplar Bluff, Missouri. The channel at Poplar Bluff is unoccupied. However, a station operating on Channel 238 at

[1] Population figures cited are from the 1970 U.S. Census.

Poplar Bluff would have to be sited at least 3 miles northwest of the community to meet the minimum mileage separation requirement from Station WBHT–FM, Brownsville, Tennessee, operating on Channel 237A. The substitution of Channel 297 for 296A at Marion would not preclude future assignments on any of the adjacent channels.

4. After consideration of the pertinent facts in this case, we are of the view that the subject proposal has merit and that its adoption would serve the public interest. Although the area which would receive a first service is minimal, approximately one-fourth of the gain area (approximately 250 square miles) would receive a second FM service. Since there are communities with Class B assignments in the neighboring area which have less population than Marion, there appear to be no substantial reasons not to substitute a Class B channel for a Class A channel in Marion. Channel 297 cannot be used at any other place in this area. Its assignment to Marion would not preclude future assignments on any of the adjacent channels. A Class C channel is substituted for a Class C channel, which is presently unoccupied at Poplar Bluff, Missouri. Thus, the substitution of a Class B channel for a Class A channel at Marion would result in efficient use of FM frequencies.

5. Authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

6. Accordingly, IT IS ORDERED, That effective September 7, 1973, the Table of Assignments (Section 73.202(b) of the Rules) IS AMENDED with respect to the communities listed as follows:

City:	*Channel No.*
Marion, Ill	297
Poplar Bluff, Mo	233, 238

7. IT IS FURTHER ORDERED, That effective September 7, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license of 3–D Communications Corporation for Station WDDD(FM), Marion, Illinois, IS MODIFIED to specify operation on Channel 297 in lieu of Channel 296A subject to the following conditions:

(a) The licensee shall inform the Commission in writing by no later than September 27, 1973, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by September 7, 1973, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WDDD(FM) on Channel 297 at Marion, Illinois.

(c) The licensee may continue to operate on Channel 296A under its outstanding authorization until it is ready to operate on the new frequency. Ten days prior to commencing operation on Channel 297, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 297 until the Commission specifically authorizes it to do so.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73–804

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (OCALA AND DUNNELLON, FLA.)	Docket No. 19683 RM–1908

REPORT AND ORDER

(Adopted July 26, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission here considers the Notice of Proposed Rule Making in this docket, adopted February 7, 1973 (FCC 73–159; 38 Fed. Reg. 4676), proposing amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations), as concerns Ocala and Dunnellon, Florida.[1] The parties filing comments are the petitioner, Osceola Broadcasting Company, Inc. (Osceola), licensee of fulltime AM Station WTMC at Ocala, and Greater Ocala Broadcasting Corporation (Greater Ocala), licensee, of daytime-only AM Station WWKE at Ocala.

2. Ocala, population 22,583.[2] is the seat and largest city in Marion County (population 69,030). Aural broadcast service at Ocala consists of FM Station WMOP–FM, Channel 229, and three AM stations—WTMC, WWKE, and WMOP (also daytime-only). FM Channel 272A is also assigned to Ocala, but it is occupied by Station WTRS–FM at Dunnellon, Florida.[3] Osceola's objective is replacement of a channel for Channel 272A at Ocala because of that channel's use at Dunnellon, which circumstance we deemed to be an appropriate basis for proposing reassignment of that channel. Osceola made additional arguments based on Ocala's size, recent growth (66.1% between the 1960 and 1970 Census), and as the focus for Marion County (whose population increase is 33.7%), and our Notice indicated that Ocala might warrant additional service in these circumstances. We also observed that petitioner's showing about first nighttime service was not sufficient, although the desirability of additional nighttime service

[1] The caption which originally referred to only Ocala is being changed to reflect that this proceeding also concerns a channel assignment at Dunnellon.
[2] All population information is from the 1970 Census, unless otherwise indicated.
[3] Dunnellon is about 22 miles from Ocala. The Commission's Rules and Regulations formerly permitted the use of a Class A channel at an unlisted community within 25 miles of the community of assignment; the distance is now 10 miles (see Section 73.203(b)).

in the area was clear.[4] The Notice stated that the proposed assignment of Channel 224A to Ocala comports with spacing requirements if a station on that channel would operate from a site at least three miles southwest of Ocala. We also noted that the proposed assignment would cause little preclusion. The cities affected—Crystal River and Dunnellon—did not merit another channel assignment considering population (1,696 and 1,146, respectively); Channel 253 had then been recently assigned to Crystal River (39 F.C.C. 2d 452, 455–7 (1973)), and in this proceeding we were proposing the reassignment of Channel 272A from Ocala to Dunnellon to conform the FM Table of Assignments to actual operation of Station WTRS–FM.

3. Osceola, as requested by the Notice, has indicated its continuing readiness to construct and operate on an FM channel if assigned to Ocala. In other respects, Osceola incorporates by reference statements in its petition, but we need not repeat such data and information which served as the basis for our Notice or what was said in the Notice. Osceola's comments were filed one day late together with an appropriate motion stating that the failure to file timely was due to an inadvertence. In the circumstances, we are permitting the late filing; this did not delay action on our part in disposing of this proceeding, and, except for reaffirming Osceola's interest, no new facts or arguments are presented.

4. As already noted, Greater Ocala, licensee of daytime-only AM Station WWKE at Ocala, also filed comments supporting the proposed assignment of Channel 224A at Ocala. Greater Ocala states that in recent years community and civic leaders as well as members of the general public have expressed to its management the desire for additional nighttime service, which need, it feels, is reinforced by the inability of the two nighttime aural services at Ocala to fully serve the area around Ocala whose percentage of growth is expected to be greater in the future. (The projected population figures for Marion County for 1980 and 1990 show increases but at a diminishing rate of 30% and 22%.)

5. While other questions were raised,[5] this proceeding basically only involves the substitution of a channel at Ocala for Channel 272A because of its use at Dunnellon and conforming the FM Table of Assignments in the latter respect. As noted above, Channel 224A is available for assignment at Ocala in lieu of Channel 272A without a change elsewhere, and the preclusionary effect is nonexistent considering all relevant factors. In the circumstances, we find that the public interest, convenience, and necessity would be served by the assignment of Channel 224A to Ocala in lieu of Channel 272A and the reassignment of Channel 272A from Ocala to Dunnellon.

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[4] In this respect, Station WMOP–FM is authorized to construct a more powerful facility than that referred in the engineering study submitted in support of the petition. However, in this respect, it would appear that operation of WMOP–FM at 75 kW power and 500 feet antenna height A.A.T. or equivalent should have been assumed; see *Roanoke Rapids-Goldsboro*, 9 F.C.C. 2d 672 (1967).

[5] The Notice also mentioned that we normally do not intermix classes of FM channels, but that issue has been disposed of when Channel 272A was assigned to Ocala in lieu of Channel 253; see *Titusville and Ocala, Florida*, 40 F.C.C. 946, 950–1 (1965).

6. Authority for this action is found in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

7. Accordingly, IT IS ORDERED, That the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED effective September 7, 1973, as concerns Ocala and Dunnellon, Florida, as follows:

City:	*Channel No.*
Ocala, Fla	224A, 229
Dunnellon, Fla	272A

8. IT IS FURTHER ORDERED, That the motion of Osceola Broadcasting Company, Inc. to accept its late filed comments in this proceeding IS GRANTED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

42 F.C.C. 2d

104-005—73——4

F.C.C. 73-761

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of J. BOYD INGRAM, CLARKSDALE, MISS. Requests: 101.7 MHz, #269, 3 kW (H & V); 193 feet For Construction Permit	File No. BPH-8050

ORDER

(Adopted July 18, 1973; Released July 24, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT. COMMISSIONERS JOHNSON, H. REX LEE AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it (a) the above application; (b) a petition to deny the application filed by Coahoma Broadcasting Company, Inc. (Coahoma), licensee of standard broadcast station WKDL, Clarksdale, Mississippi, (c) two supplements to the petition to deny; and (d) pleadings in response and opposition to the petition to deny, as supplemented.

2. Coahoma's station WKDL(AM) is licensed to serve Clarksdale and will compete for listeners and advertising revenues with any FM broadcast station serving the community. Therefore, we find that Coahoma has standing as a party in interest within the meaning of section 309(d) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 9 RR 2008 (1940).

3. The pleadings filed by Coahoma attempt to raise qualification issues concerning the adequacy of Mr. Ingram's financial plan and his ascertainment of community problems, the apparent unavailability of his originally proposed transmitter site, and his initial failure to reveal his interest in and commitments to an FM broadcast application for Clinton, Mississippi. In addition, Coahoma alleges that a trafficking issue should also be designated against Mr. Ingram concerning the sale of a construction permit for an FM broadcast station in Helena, Arkansas. All of these contentions have been effectively refuted by Mr. Ingram's pleadings and by subsequent amendments to his application, and certain inconsistencies apparent in the application appear to be the result of carelessness rather than an attempt at deliberate misrepresentation.

4. In regard to Mr. Ingram's financial ability to construct and operate his proposed station for one year, Coahoma has made various allegations directed at the initial application and at various amendments to the application, including the following: that Mr. Ingram's projected expenses of $14,000 for three announcer-engineers were unrealistic and insufficient to accomplish his proposed programming; that Mr. Ingram had not allowed for any studio remodeling expenses;

that his balance sheet did not show the availability of the amount of net liquid assets upon which he was relying; that he had not shown the availability of a $5,000 loan from his mother because she had not filed a balance sheet which demonstrated her ability to make such a loan; that Mr. Ingram's October 16, 1972, amendment demonstrated an attempt to inflate his financial position by representing to a radio equipment company that he would buy $7,500 worth of equipment, since he claimed deferred credit based on that amount of equipment, and the company had supplied a letter expressing its willingness to supply that amount on the terms mentioned by Mr. Ingram, even though another part of the application indicated that he would purchase only about $5,000 worth of equipment; that Mr. Ingram initially misrepresented the amount of rent that he would have to pay for studio and transmitter space; that he did not reveal his financial commitment to an FM application filed by Leader Broadcasting Company for Clinton, Mississippi, which would have a significant impact on his financial qualifications insofar as his Clarksdale proposal was concerned; that as of October 16, 1972, the financial portion of his application stated that he would not have to make any payments on loans during the first year of his proposed station's operation, even though a letter from the Bank of Shaw stated that it required first-year payments on its projected loan; and that his commitment to an FM proposal for Clinton would result in the use of assets upon which the Bank of Shaw was relying as security for his projected loan.

5. Mr. Ingram's application, as amended, shows the availability of $53,000 in liquid assets to meet expenses totaling $39,929. Thus, with this $13,000 "cushion," Mr. Ingram can increase the salaries paid to his announcer-engineers, which are now projected at $16,000, and can meet any other unforeseen contingencies that might arise. In addition, Mr. Ingram's mother has now agreed to loan him $7,500 and has filed a balance sheet which demonstrates her ability to make that loan. Moreover, Mr. Ingram has filed a letter from Collins Radio Company dated November 10, 1972, which provides for the purchase of equipment worth about $5,000 on a deferred credit basis, which is less than the amount of equipment which the financial portion of Ingram's application indicated that he would actually purchase, as of December 12, 1972. In regard to the letter from Collins Radio Company dated October 6, 1972, in which that company expressed its willingness to sell the applicant $7,500 worth of equipment, and which Coahoma claims should give rise to a hearing issue concerning Mr. Ingram's good faith in suggesting that he would buy that amount of equipment from that company, we note that Mr. Ingram's application, as amended in October 1972, relied on funds totaling $56,841 to meet expenses of $34,175 and that the amount of deferred credit from the radio supply company totaled only $3,441. Thus, in the absence of additional facts, no substantial evidence of intentional misrepresentation by Mr. Ingram has been presented insofar as the October 6, 1972, letter from Collins Radio Company is concerned. As for Mr. Ingram's estimated rent expenses for his studio and transmitter sites, he has filed a letter from a realty company which expresses that company's willingness to rent a combined transmitter-

studio site for $250 per month and this amount has been included in his projected first-year costs. The allegations made by Coahoma concerning possible misrepresentation of the availability of the original transmitter site will be dealt with in paragraph 7 of this Order.

6. As to the problems raised by Mr. Ingram's financial commitment to an FM application submitted by Leader Broadcasting Company for Clinton, Mississippi, and his initial failure to reveal his commitment to that application, we observe that Mr. Ingram did subsequently reveal his financial commitment to that applicant and further, that the Clinton application has been dismissed pursuant to an agreement between the applicants for the FM broadcast frequency assigned there, which was approved by the Commission on May 9, 1973. Thus, Mr. Ingram no longer has any commitments to the Clinton FM application. Lastly, with regard to Mr. Ingram's projected $11,000 loan from the Bank of Shaw, we note that Mr. Ingram's application, as amended on October 16, 1972, did not list the first-year payments which would be due to the Bank of Shaw, but that these payments would not exceed $3,000. A subsequent amendment included a letter from the Bank of Shaw which expressed the bank's willingness to loan his $11,000, but which did not require any payments until 13 months after the loan had been actually made. Furthermore, the applicant's current financial plan does not rely upon a loan from the Bank of Shaw. Thus, at worst, Mr. Ingram's omission of the payments due on this loan seems to have been the result of carelessness. In any event, there is no significant evidence that Mr. Ingram was trying to inflate his financial position as of October 16, 1972, especially since the letter from the Bank of Shaw, which was included in the application, clearly stated the terms of repayment of the loan in question. Thus, in light of the foregoing, we find that no substantial and material questions of fact have been raised in regard to Mr. Ingram's financial qualifications which would warrant further exploration in the hearing process. In addition, as explained above and in subsequent paragraphs, no questions of fact concerning Mr. Ingram's qualifications to be a broadcast licensee have been raised.

7. In its "Supplement to Petition to Deny" filed October 5, 1972, Coahoma asserted that Mr. Ingram had no assurance of the availability of land at the rent specified in his application. Moreover, Coahoma submitted an affidavit from Mr. Charles W. Clark, Jr., the owner of Mr. Ingram's initially proposed transmitter site, which states that Mr. Clark and Mr. Ingram had discussed the possible use of Mr. Clark's land for Mr. Ingram's FM station, but that no agreement had been reached. Nevertheless, the affidavit explains that Mr. Clark was not "precluding the possibility of future agreement with Mr. Ingram." In an amendment filed on October 17, 1972, Mr. Ingram states that he contacted the owner of the proposed transmitter site to "finalize" the availability of the property, but that Mr. Clark said that he had other plans for the property. Mr. Ingram explains that he subsequently obtained an offer from Valley Realty Company to provide a building designed to house both the transmitter and studio site at a rental fee of $250 per month. Mr. Ingram's application in-

cludes a letter from Valley Realty Company which states this offer. Thus, Mr. Ingram currently has reasonable assurance of the availability of his proposed transmitter-studio site. Nevertheless, the current availability of the site does not, in itself, resolve the question of whether Mr. Ingram intended to deceive the Commission by misrepresenting the availability of his originally proposed site. In view of the history of Mr. Ingram's attempts to procure a transmitter site, however, it would appear that Mr. Ingram merely misconstrued Mr. Clark's position at the time that the availability of his land was initially discussed. There is no indication that Mr. Ingram was attempting to intentionally deceive the Commission or that the predicted cost of a transmitter site was so great that Mr. Ingram would have had any reason to attempt to mislead the Commission in this regard. We also note that Mr. Ingram was not represented by legal counsel until October 20, 1972, and could thus have been quite unaware of the tenuous quality of any agreement he thought he had with Mr. Clark concerning the availability of a site. In any event, there is no apparent deception on Mr. Ingram's part, and it is difficult to conceive of any motive for deception since Mr. Ingram has clearly indicated his interest in establishing a viable FM station in the course of the vigorous prosecution of his application. Thus, no hearing issue regarding this matter would appear to be justified.

8. As noted, Coahoma also contends that Mr. Ingram did not answer paragraph 19, section II, of the application form correctly in that he did not list his interest in the then-pending application of Leader Broadcasting Company for authority to construct an FM station in Clinton, Mississippi, which had been filed prior to the filing of Mr. Ingram's application. In a responsive pleading, Mr. Ingram explained that he had read the instructions in paragraph 19, section II, to mean that the Commission desired to know about any past, as opposed to pending, applications filed with the Commission. He states that he later realized that the application required information concerning pending applications as well, but he asserts that he intended to file an amendment which would explain his interest in the Clinton application after he received official notice from the Commission that his Clarksdale application had been accepted. Mr. Ingram did, in fact, subsequently amend his Clarksdale application to show his interest in, and financial commitment to, the Clinton application. The Clinton proposal was later dismissed pursuant to an agreement between the applicants, which we approved on May 9, 1973. Given these facts, we cannot perceive any reason for designating a hearing issue concerning the matter of Mr. Ingram's belated disclosure of all his interests in past and present broadcast applications.

9. Coahoma also alleged the possibility that Mr. Ingram was involved in the trafficking of a construction permit for an FM station in Helena, Arkansas, for which he received a grant on October 9, 1970. We note that Mr. Ingram listed his application for that construction permit in response to paragraph 19, section II, of his application for Clarksdale. Thus, there is no possibility that Mr. Ingram intended to conceal his interest in that application. Furthermore, we

approved the sale of the construction permit for Helena, Arkansas, at a price of only $1,000. No objections were submitted against the application to assign the permit. Furthermore, at the time that Mr. Ingram applied for approval of that sale, he stated that his reason for selling the construction permit was that he wished to concentrate on his business interests in Mississippi, which is certainly evidenced by his application for Clarksdale and his recent interest in an FM application for Clinton, Mississippi. Given the slight amount of money for which the Helena, Arkansas, construction permit was transferred, and the lack of any other apparent trafficking motive, we fail to discern any basis for Coahoma's untimely allegation. Therefore, no hearing issue is required in this regard.

10. Lastly, in its initial petition to deny, Coahoma claimed that Mr. Ingram's responses contained in section IV–A of his application in respect to his ascertainment of community problems and his proposed programming were insufficient to establish that the construction and operation of his proposed station would be in the public interest. Specifically, Coahoma asserted that Mr. Ingram had not set forth the demographic characteristics of Clarksdale, had interviewed only seven women even though women constitute the majority of the population of Clarksdale, had not stated the length of the programs proposed as being responsive to community problems so that the Commission could not judge whether a reasonable amount of time was to be devoted to such programs, and proposed an unduly slight amount of "other" programs in addition to music and news. In a responsive pleading, Mr. Ingram explained that he had submitted demographic data concerning the population of his proposed service area, that one of his employees had conducted 200 telephone interviews which included about 54 women, that seven women had been personally interviewed as part of his community leader interviews, and that his overall ascertainment of community problems and needs indicated, in addition to the problems of the community, that his prospective listeners desired a format that was primarily music and news. In addition, Mr. Ingram has amended his initial ascertainment to include a more complete description of Clarksdale and his efforts to ascertain the problems there, and has specified the length of each program proposed as being responsive to community problems. Thus, as amended, Mr. Ingram's ascertainment of community problems includes a representative cross-section of the population of Clarksdale and complies with the standards set forth in our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). Moreover, he has proposed a sufficient number of programs which appear to be responsive to those problems. Thus, no further inquiry into the adequacy of Mr. Ingram's ascertainment or his proposed programming is warranted.

11. In view of the foregoing discussion, we find that the petition to deny filed by Coahoma Broadcasting Company, Inc., licensee of standard broadcast station WKDL, Clarksdale, Mississippi, has failed to raise any substantial and material questions of fact in regard to J. Boyd Ingram's application which would warrant a hearing. Fur-

thermore, we have examined the proposal and find that J. Boyd Ingram is fully qualified to construct and operate his proposed station, and that a grant of his application would serve the public interest, convenience, and necessity.

12. Accordingly, IT IS ORDERED, That the above petition filed by Coahoma Broadcasting Company, Inc., licensee of standard broadcast station WKDL, Clarksdale, Mississippi, IS DENIED, and that the application of J. Boyd Ingram (BPH–8050) IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73–811

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS INC. Petition Under Section 201(a) of the Communications Act of 1934 for Connection With RCA Global Communications, Inc. to Enable ITT World Communications Inc. To Provide Telex and Message Telegraph Services to Guam	Docket No. 19684

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission is considering, on its own motion, pursuant to Sections 201(a) and 4(i) of the Communications Act of 1934, an amendment to the issues set for hearing in this matter in the Commission's Memorandum Opinion and Order of February 20, 1973 (FCC 73–144).

BACKGROUND

2. This proceeding was instituted by Memorandum Opinion and Order of February 20, 1973 (FCC 73–144) on petition of ITT World Communications Inc. (ITTWC), requesting that the Commission, pursuant to Section 201(a) of the Communications Act of 1934, direct RCAGC to cooperate with ITTWC in establishing an electrical interconnection between RCAGC's telegraph message and telex systems on Guam and ITTWC's telegraph message and telex systems, establishing through routes and charges applicable thereto and the division of such charges, and establishing and providing facilities and regulations for operating such through routes.[1]

[1] The hearing order encompassed the following issues:
"(1) Whethere it is necessary or desirable in the public interest to require RCAGC to interconnect its telegraph message and telex facilities with facilities of ITTWC for the provision of service to and from Guam.
(a) The effects, financial and other, on ITTWC and RCAGC telex and message services, and the public, were no interconnection to be established; and
(b) The manner in which ITTWC customers are able to send or receive messages to and from Guam in the absence of interconnection.
(2) The points at which interconnection, if any, should be established, and the financial and other effects on the ITTWC and RCAGC telex and message services and the public.
(a) The through routes and charges to be established; and
(b) The facilities and regulations appropriate to the operation of such routes.
(c) The charges and the classifications, regulations and practices affecting such charges; and
(d) The appropriate division of such charges."

3. Subsequently RCAGC filed on March 19, 1973, a motion to clarify and enlarge the hearing issues to specifically include whether ITTWC had any right under the International Formula prescribed by the Commission pursuant to Section 222 of the Communications Act of 1934 [2] to unrouted Guam-bound message telegraph traffic originating in the Western Union Telegraph Company (WU) domestic network, whether there should be an amendment to the Formula, and the financial effect on RCAGC in the event of any redistribution of traffic under the Formula. RCAGC represented that it received no quota under the Formula for Guam-bound traffic since it did not operate facilities to that point until 1952. It is to be noted, however, that all unrouted Guam-bound message telegraph traffic has been distributed to RCAGC because it alone has been authorized to serve Guam.[3] If a present right to unrouted traffic were successfully established by ITTWC and interconnection were ordered at a point outside of the United States Mainland, RCAGC expects that ITTWC would receive the total unrouted message telegraph traffic presently handled by RCAGC.[4]

4. In our Order of May 29, 1973, we denied the RCAGC motion for enlargement,[5] finding that ITTWC's petition for interconnection and subsequent associated pleadings (including those of WUI) were directed solely at gaining direct access to Guam for exclusive telex subscribers and control over telegraph messages specifically routed via ITTWC (or WUI) facilities and contained nothing to indicate that there was any intent to claim rights to unrouted traffic under the Formula, or to request an amendment to the Formula. Accordingly, we concluded that there was "no reason to include in the instant proceeding any issue addressing the necessity or desirability of effecting a change in the current distribution of Guam-bound message telegraph traffic pursuant to the International Formula as an incident to interconnection." We provided, however, that if ITTWC (and/or WUI) informed the Commission within 15 days of the release of the order it intended to seek a redistribution of unrouted traffic under the Formula were interconnection ordered, we would take appropriate steps to consider such issue in conjunction with Docket No. 19660, *In*

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[2] Merger of Western Union Telegraph Company and Postal Telegraph Company, Separate Report of the Commission on the Formula, 10 FCC 2d 184 (1943). The Formula, which has been amended subsequent to its inception in 1943, governs the distribution among international telegraph carriers of message traffic filed with the Western Union Telegraph Company. It sets out a quota system for the distribution to the international carriers of unrouted outbound messages which, added to messages specifically routed via such carrier, gives each such amount of gross international tolls to a geographical subarea as is proportionate to its share of total industry tolls to such areas in a base period.

[3] The only companies operating on Guam during the base period were Commercial Pacific Cable Company, now defunct, and Globe Wireless, now absorbed into ITTWC. Globe Wireless was acquired in 1960 by AC&R, a subsidiary of International Telephone and Telegraph Corporation. According to RCAGC, it could theoretically be argued that ITTWC has succeeded to the quota of Globe Wireless, even though in the 32 years since the base period it has never applied for it.

[4] ITTWC opposed RCAGC's motion for enlargement, arguing that formula considerations would have no effect on the amount of revenue derived by RCAGC from its operations on Guam and thus were remote from the central issues in the subject proceeding, and consideration of a revision of the Formula would be frivolous in light of the pending Commission Inquiry, *In the Matter of International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions of the Formula Prescribed under Section 222 of the Communications Act* (Docket No. 19660).

[5] At the same time the Commission granted a motion of Western Union International, Inc., amending the issues in the instant proceeding to include WUI wherever mention is made of ITTWC.

the Matter of International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions of the Formula Prescribed under Section 222 of the Communications Act.

5. On June 13, 1973, ITTWC timely filed notice of its intention to seek a redistribution of Guam-bound unrouted message traffic in the event the requested interconnection is ordered. At the conclusion of its filing ITTWC added the following:

> "Being unaware of any basis for such action, we assume that the normal administration of the Formula will not be stayed respecting the initial determination and recognition of any carrier's Guam quota rights."

6. Responding to such language, RCAGC filed on June 28, 1973, a motion for clarification requesting that in the event interconnection is ordered herein, the Commission "make it explicit that the present existing distribution of unrouted message telegrams will not be affected by any action except after completion of the necessary proceedings in Docket 19660." RCAGC asserts that if ITTWC were free to effect the distribution of unrouted traffic through other means (e.g., by virtue of the independent operation of the terms of the Formula), the Commission's Order of May 29, 1973 does not adequately protect the rights of RCAGC in the interconnection proceeding.

7. ITTWC filed an opposition to the RCAGC motion on July 11, 1973. It argues that the question raised by RCAGC is purely academic in the absence of the establishment of a Guam telegraph interconnection on a normal correspondency basis, an assertion by ITTWC of quota rights prior to disposition of Docket 19660, and the recognition of such rights by the "Formula's administrative apparatus." It also asserts that RCAGC's effort to stay the "normal administration of the Formula" while ITTWC's Guam quota rights are studied (presumably within Docket 19660) is inconsistent with RCAGC's position in Docket No. 19660 that the existing Formula is not unjust, unreasonable or inequitable. Finally, it argues that adoption of the RCAGC view would constitute an unprecedented and discriminatory suspension of ITTWC's rights under the Formula pending final disposition of Docket 19660.

DISCUSSION

8. Upon review of ITTWC's June 13, 1973 filing and its recent pleading in opposition to RCAGC's motion for clarification, it appears that, contrary to the impression derived from earlier pleadings in this matter, ITTWC intends to apply under the existing International Formula for a share of unrouted Guam-bound message telegraph traffic if an interconnection with RCAGC is ordered in this proceeding (in addition to its clearly stated desire to handle telex and routed message telegraph traffic via such interconnection). ITTWC appears to believe it is entitled to such traffic under the Formula as presently written and that it need not wait for the conclusion of Docket No. 19660 to accomplish a redistribution of Guam traffic, as we originally contemplated.

9. When the question as to ITTWC's precise position with respect to unrouted traffic was raised initially by RCAGC in its March 12,

1973 motion for clarification and enlargement of the issues, ITTWC in its opposition referred to the remoteness of Formula considerations to this proceeding and the frivolity of Formula revision outside the pending Docket No. 19660. It left open the question of whether it would seek, as a consequence of an affirmative decision in this proceeding, a redistribution of traffic under the International Formula as it presently exists. In its June 13 filing, however, ITTWC's concluding remark suggested that a change in the current distribution of unrouted Guam-bound message traffic may be sought as an incident to interconnection, pursuant to the "normal administration of the Formula," pending conclusion of the broader policy concerns in Docket No. 19660.

10. When the question as to ITTWC's intentions with respect to unrouted traffic was raised a second time in RCAGC's June 29, 1973 motion for clarification, ITTWC again argued the irrelevancy of the redistribution issue in this proceeding. It also expanded on its concern that the normal administration of the Formula and the recognition of quota rights by the Formula's administrative apparatus not be stayed pending Docket No. 19660, thus intimating further, but without detail, that a change in the current distribution of Guam traffic would be sought as an incident to interconnection other than in the context of Docket No. 19660.

11. We disagree with the position taken by ITTWC that a change in the current distribution of unrouted Guam-bound message traffic as an incident to interconnection would have no relevant impact on RCAGC (on the theory that the hearing herein relates only to the Guam half of the interconnected circuit and not the Mainland half). It is clear that should ITTWC be entitled as a matter of law to such unrouted traffic under the present Formula, the effect on RCAGC, which has heretofore handled 100% of unrouted Guam message traffic, would be relevant to a resolution of the financial issues set for hearing in the Commission's Order of February 20, 1973.

12. Accordingly, we find it appropriate to add to this proceeding the issue of whether ITTWC, in the event interconnection is ordered, would be entitled to quota rights under the existing International Formula. If ITTWC is entitled to such rights, we would then consider projected financial and other effects of the consequent redistribution of traffic on RCAGC. The quota rights question appears to be one of law; therefore, it should be addressed in the form of written briefs submitted to the Commission for its determination. The hearing need not be deferred pending the resolution of this issue since it is likely that testimony offered in response to the issues originally set for hearing in the Commission's February 20, 1973 Order will produce sufficient traffic and revenue data to enable consideration of the effect of any possible redistribution of traffic should the Commission find in favor of ITTWC. If necessary, however, appropriate steps may be taken to incorporate additional oral testimony into the hearing record.

CONCLUSION

13. In light of ITTWC's recent intimations that it may seek a redistribution of unrouted Guam-bound message traffic as an incident

to interconnection prior to the conclusion of Docket No. 19660 and the clear relevancy of such a possibility to the instant proceeding, we are compelled to amend the issues identified for Commission inquiry in this proceeding in the February 20, 1973 Order.[6]

14. Accordingly, IT IS ORDERED, that

(A) the second issue of the Commission's inquiry in Docket No. 19684, initiated by Memorandum Opinion and Order released February 20, 1973 (amended by Memorandum Opinion and Order released May 29, 1973, to include WUI wherever mention is made of ITTWC) shall be amended to read as follows:

"(2) The points at which interconnection, if any, should be established and the financial and other effects, including the redistribution of unrouted Guam-bound message telegraph traffic pursuant to the International Formula, on the ITTWC, WUI and RCAGC telex and message services and the public . . ."

(B) A third issue shall be added to the inquiry in Docket No. 19684, as follows:

"(3) The rights of RCAGC, ITTWC and WUI to unrouted Guam-bound message telegraph traffic under the existing International Formula."

(C) The third issue referenced in (B) above shall be addressed by the parties in the form of written briefs submitted to the Commission within 15 days of the release of this Order. Such briefs shall be personally served by each party on the other parties herein, and a certificate to such effect shall be filed with the Commission. Replies may be filed by any party within 5 days thereafter. A determination may be made by the Commission independently of the scheduled hearing in this matter. The hearing shall continue as scheduled, and the Administrative Law Judge shall defer the closing of the record until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[6] In light of this conclusion, there is no apparent need to consider on its merits and dispose of RCAGC's pending Motion for Clarification filed June 28, 1973.

F.C.C. 73-809

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF EDWIN E. MERRIAM AND ROBERT W. TOBEY, D.B.A. LUNA COUNTY BROADCASTING CO., LICENSEE OF RADIO STATION KOTS, DEMING, N. MEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released August 1, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated August 9, 1972, addressed to Edwin E. Merriam and Robert W. Tobey, d/b/a Luna County Broadcasting Company, the licensee of Radio Station KOTS, Deming, New Mexico, and (2) the licensee's response dated September 10, 1972 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability in this proceeding indicated that the licensee was subject to apparent liability for forfeiture in the amount of five hundred dollars ($500) for willful or repeated violations of Sections 73.93(c) and 73.111(a) of the Commission's Rules, in that from July 17, 1971 to October 23, 1971, the licensee did not have an operator holding a first-class radiotelephone operator's license employed full-time nor did the licensee employ such an operator under contract on a part-time basis and during the same period the licensee did not keep a maintenance log for the station.

3. In response to the Notice of Apparent Liability the licensee does not deny that the violations occurred. However, licensee in effect seeks full remission of the liability citing, among other things, its past record of compliance, the fact the station equipment was in good condition despite the violations and that the inspection was made at an unreasonable hour (5:10 p.m.).[1] We find that from July 17, 1971 to October 23, 1971, the licensee failed to employ a full-time first-class radiotelephone operator or have such an operator under contract on a part-time basis in repeated violation of Section 73.93(c) of the Commission's Rules, and that throughout the same period the licensee failed to keep a maintenance log, in repeated violation of Section 73.111(a) of the Commission's Rules. Having found that the violations were repeated, it is unnecessary that we make an additional find-

[1] The station was in operation at the time of the inspection.

ing as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. This proceeding is confined to those violations which occurred within one year prior to the date of the issuance of the Notice of Apparent Liability. We have considered all of the matters set forth in the licensee's response but we are not persuaded to remit or mitigate the amount of the forfeiture. Licensees are expected to know and comply with the Commission's Rules. *J. C. Johnson tr/as Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970).

4. In view of the foregoing, IT IS ORDERED, That Edwin E. Merriam and Robert W. Tobey, d/b/a Luna County Broadcasting Company, the licensee of Radio Station KOTS, Deming, New Mexico, FORFEIT to the United States the sum of five hundred dollars ($500) for repeated violation of Sections 73.93(c) and 73.111(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to Certified Mail—Return Receipt Requested to Edwin E. Merriam and the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Robert W. Tobey, d/b/a Luna County Broadcasting Company, licensee of Radio Station KOTS, Deming, New Mexico.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-709

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
NAACP AND THE MIDDLE TENNESSEE COMMUNITY COALITION FOR COMMUNICATIONS
For Extension of Time To Protest License Renewals in the Nashville, Tennessee Area

JUNE 27, 1973.

CERTIFIED AIR MAIL—RETURN RECEIPT REQUESTED
REGINALD A. STUART,
Chairman, NAACP-MTCCC Negotiating Committee,
1308 Jefferson Street,
Nashville, Tenn.

DEAR MR. STUART: This is in reference to your telegram on behalf of the Nashville branch of the National Association for the Advancement of Colored People and the Middle Tennessee Community Coalition for Communications (NAACP–MTCCC), which was received by the Commission on June 25, 1973. In your telegram, you request that the time for formally protesting the license renewals of several radio and television stations in the Nashville, Tennessee area be extended to and including August 2, 1973.[1]

It appears that your requests are directed to the timely filed license renewal applications for Station WVOL, Berry Hill, Tennessee and Stations WLAC–AM–FM–TV, WSIX–AM–FM–TV, WSM–AM–FM–TV, and WMAK, Nashville, Tennessee. Further it does not appear that copies of your letter and telegram were served upon the licensees of the aforenoted stations, and their consent to the requested extension of time is nowhere indicated.

Section 1.580(i) of the Commission's rules provides, in substance, that a petition to deny a license renewal application must be filed on or before the first business day of the last full month of the station's license term. Licenses for broadcast stations located in Tennessee expire on August 1, 1973. Accordingly, a timely filed petition to deny is due on July 2, 1973. Absent good cause shown, the Commission will not grant a waiver of Rule 1.580(i) to authorize the filing of a petition after that date. See, *e.g.*, *WSM, Incorporated*, 24 FCC 2d 561 (1970) and *Trumbull County N.A.A.C.P.*, 25 FCC 2d 827 (1970).

In support of your request, you state that you have been negotiating with the aforenoted licensees and are seeking the requested extension so that these negotiations can be completed. On the basis of the information before us, the Commission concludes that you have failed to

[1] An identical request was set forth in a letter of June 21, 1973, which was also received by the Commission on June 25, 1973.

demonstrate good cause for waiver of Section 1.580(i) of our rules. See *Congress of Racial Equality*, 27 FCC 2d 353 (1971). It should be pointed out that your telegram and letter were tendered with the Commission shortly before the deadline for filing petitions to deny license renewal applications for broadcast stations located in Tennessee. We have repeatedly stated that such last-minute requests, made without adequate supporting basis, will be denied. See *Colorado Broadcast Stations*, 28 FCC 2d 375 (1971) and 29 FCC 2d 11 (1971). Our action, of course, is without prejudice to the NAACP–MTCCC's right to informally protest the aforenoted license renewal applications. See Rule 1.587.

It should be noted, however, that protests against license renewal applications are not the exclusive instruments available to community groups which seek to affect changes in the operation of the broadcast facilities serving their community. We have found that co-operation at the local level is a particularly effective method of resolving local problems and improving local service. Accordingly, we wish to reaffirm our prior expression of policy of encouraging community-broadcaster discussions throughout the license term. Obviously, while under an obligation to ascertain and program for community problems, no broadcaster can be aware of everyone's needs all the time. Interested members of the community who feel a station's performance is inadequate should so advise the broadcaster to afford him an opportunity to consider their ideas and suggestions. Such discussions will be more effective if conducted throughout the license term, rather than only at renewal time. If members of the public choose to wait until the end of the license term to petition to deny a license renewal, they must comply with the procedural requirements of the Communications Act of 1934, as amended, and the Commission's implementing rules.

In view of the foregoing, IT IS ORDERED, That the request of Reginald A. Stuart on behalf of the NAACP–MTCCC IS DENIED.

Commissioner Nicholas Johnson dissenting. Commissioner Benjamin L. Hooks abstaining.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73R–164

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
NORTHEAST OKLAHOMA BROADCASTING, INC.	Docket No. 19639
VINITA, OKLA.	File No. BP–19163
PBL BROADCASTING CO., VINITA, OKLA.	Docket No. 19640
For Construction Permits	File No. BP–19233

MEMORANDUM OPINION AND ORDER

(Adopted April 20, 1973; Released April 26, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. The above-captioned applications to operate the facilities of Station KVIN, Vinita, Oklahoma, on a regular basis were designated for hearing by Commission Order, FCC 72–1031, released November 21, 1972, 37 FR 25066, published November 25, 1972. The issues specified encompass inquiries into PBL Broadcasting Company's (PBL) financial qualifications, the effect of PBL's proposal on safety to air navigation, and a standard comparative issue. PBL, on December 18, 1972, filed a petition for enlargement of issues, seeking addition of the following issues: [1]

a. Whether Ralph L. Weir, Jr., and Robert K. Weary are undisclosed parties in interest or principals in Northeast Oklahoma Broadcasting, Inc.

b. Whether the principals have misrepresented facts to the Commission concerning ownership and control of Northeast Oklahoma Broadcasting, Inc. and its predecessor, Green Country Broadcasting, Inc.

c. The facts and circumstances surrounding efforts by Northeast Oklahoma Broadcasting, Inc., including use of facilities of Station KVIN, to solicit and aid *ex parte* contacts on behalf of KVIN to the Federal Communications Commission.

d. The facts and circumstances surrounding the violation of Section 73.1201 of the Commission's Rules regarding station identification of Station KKMA, Pryor, Oklahoma, including any involvement of Wallace Dale Sparks.

e. The facts and circumstances surrounding the suit by L. L. Gaffaney against Wallace Dale Sparks, Case No. C–72–17 in the District Court in and for Craig County, State of Oklahoma for money damages.

f. Whether Northeast Oklahoma Broadcasting, Inc., has failed to disclose material information, regarding a., b., d., and e. above, to the Commission in its application, or comply with the provisions of Sections 1.514 and/or 1.65 of the Commission's Rules.

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[1] The Board also has before it for consideration: a supplement to the petition to enlarge, filed by PBL on December 29, 1972; an opposition to the petition to enlarge, filed January 10, 1973, by Northeast Oklahoma Broadcasting, Inc. (Northeast); a further supplement to the petition to enlarge, filed January 16, 1973, by PBL; the Broadcast Bureau's comments, filed January 17, 1973; and a reply to the opposition to the petition to enlarge, filed January 22, 1973; two petitions for leave to file supplements to opposition, filed by Northeast on February 2 and March 7, 1973, respectively; and an opposition to the petition for leave to supplement, filed March 15, 1973, by PBL.

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g. The efforts made by Northeast to ascertain community needs and interests for the area to be served and the means by which the applicant proposes to meet those needs and interests.

h. Whether, in light of the evidence adduced pursuant to the foregoing issues, Northeast possesses the requisite qualifications to be a licensee of the Commission, or in the alternative, if a comparative demerit or demerits should be assessed against it.

2. The undisclosed party-in-interest and misrepresentation issues are based essentially on the same facts. PBL first points out that Ralph L. Weir, Jr., is the father of Daniel R. Weir, Northeast's president and 70% stockholder. PBL states further: that Ralph L. Weir, Jr., originally owned 40% of Green Country Broadcasting Company, the original applicant for KVIN's facilities; that Ralph L. Weir, Jr., owns extensive CATV and broadcast interests elsewhere; and that at the time the corporate name was changed from Green Country to Northeast Oklahoma Broadcasting, Inc., Ralph L. Weir, Jr., and three of the other principals of Green Country withdrew from the corporation, Daniel R. Weir increased his holdings from 10% to 70%, and a new shareholder, Jim Smith, was brought into the corporation.[2] PBL also points out that Daniel R. Weir paid for his additional shares of stock in Northeast with the proceeds of a $30,000 loan from the First State Bank of Junction City, Kansas, and that Northeast relies upon a commitment from that bank to lend it $45,000 to establish its financial qualifications. Each of these loans, PBL observes, is guaranteed by Ralph L. Weir, Jr. Moreover, PBL notes, Ralph L. Weir, Jr., and Robert K. Weary, attorney for Ralph L. Weir, Jr., and for Northeast Broadcasting, Inc., are both directors of that bank. PBL further contends that Daniel R. Weir is only 21 years of age and his most recent employment has been at radio stations owned by his father, Ralph L. Weir, Jr. PBL also alleges that Robert K. Weary and Ralph L. Weir, Jr., engaged in negotiations with PBL's principals, looking toward arrangements for the interim operation of KVIN in June of 1972, and in December of 1972. PBL contends that the change in ownership of Northeast was accomplished to hide Ralph L. Weir's real ownership and thus improve the comparative position of Northeast in this proceeding. Therefore, PBL contends, issues concerning the real party in interest and an issue to inquire whether Northeast has in fact made misrepresentations to the Commission should be included in the proceeding.

3. Northeast, in opposition, concedes that Daniel R. Weir is the 21-year old son of Ralph L. Weir, Jr., and that Ralph L. Weir, Jr., has agreed to guarantee repayment of his son's loan from the First State Bank of Junction City, Kansas, and the loan to Northeast. Moreover, Northeast concedes that Robert K. Weary is its attorney and its registered agent in the State of Oklahoma. However, Northeast points out that the terms of the loans only require Ralph L. Weir, Jr.'s guarantee until such time as the Commission grants Northeast a regular license

[2] PBL notes that it has filed a petition with the Commission to have Northeast's application severed from this proceeding and returned to the processing line, based on the contention that the change in corporate ownership was grounds for dismissal under Section 1.571(j)(2). That petition was denied by the Administrative Law Judge, by Order, FCC 73M-31, released January 10, 1973.

to operate KVIN. No further guarantee is required by the bank. Furthermore, Northeast contends that the employment of Daniel R. Weir by his father and the father-son relationship do not give rise to the presumption that the father will exercise control of Northeast; nor does the fact that Northeast changed its corporate structure prior to designation for hearing warrant the presumption that there was an attempt to mislead the Commission. As to the negotiations with PBL, Northeast points out that in June, 1972, Ralph L. Weir, Jr., was still the principal stockholder and president of the Green Country Broadcasting Corporation, and alleges that Ralph L. Weir, Jr., did not participate in the December negotiations which were conducted by telephone; rather, it is alleged that these negotiations were conducted by Mr. Weary and Mr. Daniel Weir. These assertions are supported by the affidavits of Robert K. Weary, Ralph L. Weir, Jr., and Daniel Weir. Mr. Weary also states in his affidavit that his relationship with Northeast is purely a professional one, and that he will exercise no influence whatsoever on the policy and management of Northeast. Further, Northeast points out that, although Daniel Weir is only 21 years of age, he is legally independent, he has had considerable experience in the broadcast business, he does not live at home and he will, in fact, move to Vinita if and when a license is granted by the Commission.

4. The requested real party-in-interest and misrepresentation issues will be denied. The relatively close relationship between father and son does not, of itself, give rise to a presumption that the father will control the affairs of the son. *Michael Rice*, 9 FCC 2d 217, 2 RR 2d 965 (1967). Nor do the terms of the loan arrangement in any way indicate that Ralph Weir, Jr., will have control over the proposed station.[3] Moreover, the affidavits of Daniel Weir, Ralph Weir, Jr., and Robert Weary make clear that the business relationships here involved are not such that the son will be subordinated by his father. In short, the Board is of the view that petitioner's argument is predicated on speculation and surmise, and lacks the specificity required by Section 1.229 of the Rules. In these circumstances, the requested issue will be denied.

5. Radio Station KVIN, Vinita, Oklahoma, has been operated by Lum A. Humphries. The Commission denied Humphries' application for renewal and Green Country Broadcasting Corporation (now Northeast) purchased the physical facilities of that station and secured a special temporary authorization to operate it. That special temporary authorization was once extended and the Commission indicated that Northeast and PBL should undertake to work out an agreement for the interim operation of the station pending the outcome of the instant litigation to determine the permanent licensee. The second STA expired before such agreement was reached and the Commission advised Northeast that it must terminate its operation of the station. Northeast thereafter petitioned the Commission to reconsider, and PBL opposed the reconsideration. PBL notes that Wallace D. Sparks and Jim Smith, both stockholders and employees of Northeast, broadcast a series of

[3] The facts that Ralph Weir, Jr., was originally a principal of the applicant and that he divested his ownership in order to improve the applicant's comparative position does not show that he retained an undisclosed interest in the applicant.

appeals to the public in Vinita requesting listeners to write or telegraph the Commission asking it to reverse its position and keep KVIN on the air. It is not disputed that Sparks and Smith frequently advised their listeners that it was not important who the eventual licensee of the station would be, but that their request was directed to obtaining a reversal of the Commission's decision requiring Northeast to immediately cease its operation of KVIN. These facts are supported by extensive tape recordings of virtually a full day's broadcasting. Moreover, it is conceded that 35 or more citizens of Vinita and the surrounding area did in fact write or telegraph Dean Burch, Chairman of the FCC, urging the Commission to reverse its decision and permit KVIN to remain on the air. PBL contends that this constitutes a solicitation of *ex parte* presentations in a restricted proceeding which is prohibited by the Commission's Rules. Northeast, in opposition, argues that it solicited a presentation in its effort to persuade the Commission to permit the continued operation of Station KVIN, but that, since it specifically pointed out that it was not seeking an effort on the part of the public to influence the outcome of the instant proceeding, its actions were not prohibited by the Rules.

6. The Board is satisfied that an issue inquiring into this matter must be added. The definition of a restricted proceeding is set forth in Section 1.1203 of the Commission's Rules. It is clear from a reading of that Section that any contested proceeding which is involved in a hearing is restricted. While it is true that the petition for extension of STA filed by Northeast was not in hearing, it is nevertheless related to the instant proceeding because it involves the continued operation of the facilities for which the applicants in the instant proceeding are seeking a permanent authorization. Moreover, the Northeast's petition to reconsider was in fact opposed by PBL. In the Board's view, these circumstances raise questions which should be explored in the context of this hearing. Northeast's reliance on *Fine Music*, 8 FCC 529, for the proposition that the communications it solicited are not prohibited by the rules is not well taken. The Commission's Rules clearly prohibit the solicitation of *ex parte* presentations in restricted proceedings, whether those presentations go to the outcome of the proceedings or are merely status inquiries.[4] *Fine Music* merely defines a narrow exception to this rule. Because Congress exercises overall supervision of the Commission's activities, the Commission concluded that a communication to a member of Congress by a party to a restricted proceeding, which resulted in an inquiry concerning the Commission's delay was not precluded by the Commission's Rules. This case affords no basis for the conclusion that an applicant may request the general public to urge an early favorable disposition in a restricted proceeding. Accordingly, an issue will be specified to ascertain the facts concerning Northeast's request that its listeners communicate with the Commission concerning the Commission's Order terminating the operation of KVIN and the effect of this activity on Northeast's qualifications to be a Commission licensee.

[4] See Sections 1.1223, 1.1225 and 1.227(e) of the Commission's Rules.

7. Wallace D. Sparks, a stockholder, vice president and director of Northeast and the proposed general manager of the facility being sought, had formerly been employed by the licensee of KVIN. After that employment was terminated he contracted with the licensee of FM Station KKMA, Pryor, Oklahoma, to establish an auxiliary studio in Vinita and to broadcast from Vinita as a time broker. Station KKMA was subsequently cited for rules violations, including station identification which failed to properly identify the city of license and which the Commission found was designed to mislead its listeners. KKMA was subsequently assessed a $2,000.00 forfeiture for these violations. Among the announcements cited were certain announcements by one Wally D.[5] Sparks acknowledged having made the announcements but in an affidavit attached to Northeast's opposition denies any intent to mislead his listeners or to violate the Commission's Rules. The Board will add an issue concerning Sparks' participation in this matter. Sparks is Northeast's proposed general manager, and in view of his broadcast management experience, it must be presumed that he had available to him, and was familiar with, the Commission's station identification rules. A subsequent affidavit disclaiming intent to violate the rules cannot relieve him of his responsibility for knowledge of those rules. In view of these circumstances, an inquiry to ascertain the facts concerning Sparks' alleged failure to comply with the Commission's station identification rules and its effect on Northeast's qualifications to be a licensee will be added to this proceeding.

8. Sparks' relationship with Station KKMA also resulted in a civil lawsuit against Sparks by the owner of that station in which it was alleged that Sparks had given Gaffaney, the licensee of Station KKMA, "hot checks" and that Sparks owed him $6,888.67. Sparks, in turn, filed a cross claim and a judgment was eventually entered against Sparks in the sum of $1,750.00, plus costs and legal fees. PBL contends that since the plaintiff in that case relied to some extent on the fact that Sparks had given him "hot checks", questions concerning Sparks' character are raised and an issue to ascertain all of the facts concerning the lawsuit and its effect on the qualifications of Northeast is required. This requested issue will be denied. Sparks' obligation to Mr. Gaffaney, licensee of KKMA, has no bearing on his ability to meet his obligation to Northeast since his stock is already paid for with the proceeds of a bank loan. Moreover, the disagreement between Sparks and Gaffaney as to the money owed, which was resolved in the civil suit is not sufficient to warrant further inquiry in this proceeding. Accordingly, the requested issue will be denied.

9. PBL also contends that Northeast's failure to report Sparks' involvement in KKMA's forfeiture for violation of rules and its failure to include reference to Gaffaney's lawsuit against Sparks warrant the inclusion of Sections 1.514 and 1.65 issues in this proceeding. PBL notes that the lawsuit against Sparks was filed on January 28, 1972, while Northeast's application was not filed until March 6, 1972. The Commission's Memorandum Opinion and Order assessing a forfeiture

[5] Northeast has conceded in an amendment to the application that the Wally D. referred to in the KKMA matter is Wallace D. Sparks, its vice president and proposed general manager.

against KKMA (FCC 72–747) was released August 30, 1972, 37 FCC 2d 74, 25 RR 2d 226. PBL urges that Northeast's failure to report the lawsuit in its application and to subsequently advise the Commission of the forfeiture requires an issue to determine whether Northeast has violated Sections 1.514 and 1.65 of the Commission's Rules. Northeast, opposing the requests, contends that Sparks was not made a party to the forfeiture proceeding and received no notice of the Commission's August 30, 1972, action assessing the forfeiture against KKMA, but that when the matter was called to its attention by counsel for PBL in an attempt to persuade it to dismiss its application, Northeast proceeded to prepare an amendment to its application, which was filed January 3, 1973. As to the civil suit against Sparks, Northeast states, there was no judgment pending at the time the application was filed. Northeast concedes that its counsel was advised of the judgment dated November 20, 1972, against Sparks by counsel for PBL but contends that it voluntarily advised the Commission of the matter within 30 days of the date judgment on the verdict was filed in the court. Thus, Northeast concludes, no violation of the rule occurred.

10. The requested issue will be denied. Northeast voluntarily amended its application to advise the Commission of the judgment against Sparks and to acknowledge that Sparks was involved in the KKMA matter. The Commission was notified of the judgment within the 30-day limitation set forth in Section 1.65 of the Rules, and we cannot agree with the petitioner's contention that it was incumbent on Northeast to report the pendency of the lawsuit since petitioner has not shown with specificity its significance on Northeast's qualifications. As to the forfeiture, we have no reason to doubt Northeast's assertion that Sparks, who was not a party to the forfeiture, was unaware of it until recently, and it was reported within 35 days after the Commission denied remission or mitigation of the forfeiture. The fact that the amendments were filed after counsel for PBL discussed the matter with counsel for Northeast does not necessitate further inquiry in this proceeding.

11. PBL notes that Northeast's survey to ascertain community needs was supervised by Ralph L. Weir, Jr., and that the interviews were conducted by Sparks and Pat Powers. PBL contends that since Weir and Powers have now withdrawn from the corporation the survey no longer complies with the requirements of the Commission's *Primer on Ascertainment of Community Needs*, 27 FCC 2d 650, and that an issue with respect to this matter should therefore be added to the proceeding. The request will be denied. PBL misconceives the relevant requirements. The *Primer*, *supra*, at question 11(a) specifies that the interviews of community leaders must be conducted by principals or management-level employees and this was done. Sparks was at the time of the interviews a 10% stockholder, vice president and proposed general manager. Since he has remained with Northeast in those capacities the ascertainment of needs survey is not deficient in this respect. The Board will therefore deny this request.

12. Accordingly, IT IS ORDERED, That the petitions to file supplement to opposition to petition to enlarge issues, filed February 2,

1973, and March 7, 1973, by Northeast Oklahoma Broadcasting, Inc., ARE DENIED; and

13. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed December 18, 1972, by PBL Broadcasting Company IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and that the issues ARE ENLARGED as follows:

1. To determine the facts and circumstances surrounding alleged efforts by Northeast Oklahoma Broadcasting, Inc. to solicit *ex parte* contacts prohibited by Section 1.1225 of the Commission's Rules.

2. To determine the facts and circumstances surrounding the alleged participation of Wallace Dale Sparks in certain violations of Section 73.1201 of the Commission's Rules by Station KKMA–FM, Pryor, Oklahoma.

3. To determine the effect of the evidence adduced pursuant to the foregoing issues on Northeast's requisite and comparative qualifications to be a licensee of the Commission.

14. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the foregoing issues SHALL BE on PBL Broadcasting Company, and the burden of proof under these issues SHALL BE on Northeast Oklahoma Broadcasting, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-224

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PLEASANT BROADCASTING CO., MT. PLEASANT, IOWA	Docket No. 18594 File No. BP-17235
DONALD K. VAN SLYKE, VERN MCDONOUGH, JAMES D. DELMONT, ALFRED R. SUNDBERG, DWIGHT, C. VREDENBURG, MARION M. COONS, VIRGIL MEYER, ROBERT M. STONE, CLARENCE H. MORTON, W. M. EIKENBERRY, JOHN E. KING, ALDO DELLA VEDOVA, GEORGE R. GARTON AND LEVORAH KELLER, D.B.A. CHARITON RADIO CO., CHARITON, IOWA	Docket No. 18595 File No. BP-17559
BCST CO. OF IOWA, INC., MT. PLEASANT, IOWA For Construction Permits	Docket No. 18596 File No. BP-17571

ORDER

(Adopted June 14, 1973; Released June 15, 1973)

BY THE REVIEW BOARD:

1. The Review Board having under consideration petition for leave to amend to update application pursuant to Section 1.65 of the Rules, filed May 8, 1973, by BCST Company of Iowa, Inc.;

2. IT APPEARING, That no objections to acceptance of the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petition for leave to amend IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-812

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
PRESTON TRUCKING CO., INC., PRESTON, MD.	Docket No. 19309
Inquiry Into Certain Arrangements for Cooperative Use of Private Microwave Systems	File Nos. 19393-19415-LG-60X
APPLICATIONS OF PRESTON TRUCKING CO., INC., FOR MICROWAVE FACILITIES AT CARLSTADT AND JERSEY CITY, N.J.	File No. 19949/50-LG-53X

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID, WILEY AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under consideration a request filed by Transportation Microwave Corporation (TMC) for "expedited action" [1] in the above entitled proceeding, responses thereto filed by a number of parties [2] and TMC's reply. The Commission also has under consideration two applications filed by Preston Trucking Company (Preston) for microwave facilities in Jersey City and in Carlstadt, New Jersey, (File Nos. 19949/50-LG-53X); petition to deny these applications filed by MCI Telecommunications Corporation (MCI); Preston's Opposition; and MCI's reply.

2. We shall consider TMC's request first. In order to place it in a proper perspective, however, a recitation of the background of this case would be helpful. On February 18, 1971, the Commission granted a series of applications filed by the Preston Trucking Company, Preston, Maryland, in the Motor Carrier Radio Service, authorizing Preston to operate a microwave relay system in 6575-6875 MHz band. The proposed system was to run generally from Ivy Hill, Pennsylvania (north of Philadelphia) to Jersey City, New Jersey, and from there to Albany, New York, and to terminate in Tonawanda, New York (just north of Buffalo). The system was intended to accommodate not only

[1] TMC's request was filed on May 30, 1973. Public notice was given on June 6, 1973, with an opportunity for filing comments thereon until July 6, 1973.

[2] Responses to TMC's request have been filed by the Preston Trucking Company, Inc. (Preston); the Western Union Telegraph Company (Western Union); the American Trucking Association, Inc. (ATA); the American Telephone and Telegraph Company (AT&T); the Central Committee on Communication Facilities of the American Petroleum Institute (API); United Video, Inc. (United Video); the Utilities Telecommunications Corporation (UTC); MCI Telecommunications Corporation (MCI); CPI Microwave, Inc. (CPI); and Western Tele-Communications, Inc. (WTCI). The Association of American Railroads (AAR) has filed a motion to strike TMC's request.

Preston's communications requirements, but also those of potentially some 280 motor carriers operating in the region under the microwave sharing provisions of the Commission's rules. See Section 93.4 of the Rules. However, unlike cooperative sharing arrangements we had authorized in the past, neither the licensee, Preston, nor any of the participants was to own the system. Instead, the system was to be constructed by the Transportation Microwave Corporation—the petitioner here—a company unrelated to Preston or to any other motor carrier. Its use was to be made available to Preston and to other motor carriers under the terms of a "lease agreement" running between Preston and TMC, and under the terms of a "participants agreement" running between Preston and other motor carriers. The net effect of these arrangements was for TMC to construct and to own the system, assume the financial responsibility and the risks involved, and to make its use available to Preston and other motor carriers at certain rates (which the motor carriers have found advantageous), with provisions for periodic renegotiation of the terms and for scaling down the rates as more motor carriers joined.

3. On August 24, 1971, on reconsideration of the Preston grants sought by a number of parties, the Commission released a Memorandum Opinion and Order, Notice of Inquiry, and Notice of Proposed Rule Making in which we sought to explore, among other issues, whether the TMC/Preston type of arrangement for the shared use of microwave systems on frequencies allocated in the Safety and Special Radio Services should be allowed.[3] See *Preston Trucking Company*, 31 FCC 2d 766. At the same time, although affirming its basic decision to grant the Preston applications, the Commission conditioned the grants and made them subject to the outcome of the proceeding and precluded extension of the backbone microwave facility during the pendency of the proceeding. We later denied Preston's request for permission to extend the system. 33 FCC 2d 385 (1972). Our original decision to grant the Preston applications has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit. The appeal is pending. *MCI-New York West, Inc.* v. *FCC*, U.S. Court of Appeals for the District of Columbia Circuit, Case No. 71-1753.

4. Meanwhile, the microwave system (some 23 stations) has been constructed, and it is now in operation. In addition to Preston, we have authorized approximately 45 other trucking companies to share its use, but, of those, ten have entered into service contracts, only two are actually receiving service, and connecting facilities to accommodate three more trucking companies are under construction. TMC claims that the uncertainties about the future of the Preston grants, difficulties and delays it has encountered in arranging interconnection with common carrier wireline facilities, and Commission-imposed restrictions against extension of the microwave system, are the principal causes for the very limited utilization of the system to date.

5. In its request, TMC states that over $4 million has been invested in the system, but it now has financial resources to continue service for

[3] The scope of the inquiry and rule making proceeding is, of course, much broader. See list of issues in paragraph 23, 31 FCC 766 at page 775.

only a few months. Further, TMC says that as long as the future of the grants for the system remains uncertain, there is no realistic opportunity to obtain additional financing, and that it will have to make a decision to curtail or to cease operation if the Commission does not take action in the matter. TMC has proposed what it terms a "compromise" solution to the issues involved, which, it believes, ". . . would meet the basic objections earlier voiced to the Preston arrangement . . . , assure some reasonable likelihood of financial success, and would lead to an early decision in this case."

6. Specifically, TMC proposes to apply for authorizations under Part 21 of our rules to operate as a specialized common carrier under the policies adopted in our decision in Docket 18920, *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971). However, TMC asks us to waive the appropriate rules now to permit it to apply for and use the frequencies authorized to Preston in the 6575–6875 MHz band [4] on which to operate the existing system, and also to apply for additional frequencies allocated in the private services for the purpose of extending the system from Ivy Hill, Pennsylvania, to Washington, D.C., and from Albany, New York, to Boston, Massachusetts. TMC proposes that it be allowed to use private microwave frequencies for a period of five years—for the existing as well as for the proposed extensions of the system. During the five-year period, TMC plans to apply for the necessary authorizations, redesign and, where necessary, re-route the system to convert its operation on common carrier frequencies. Finally, TMC proposes to reserve fifty percent of the total available circuit capacity solely for customers eligible in their own right to use and share private microwave systems.[5]

7. TMC's proposal has been supported by the Preston Trucking Company, the licensee of the microwave system, and by the American Trucking Association (ATA). Preston says that its objective is to obtain for itself and for other trucking companies efficient communications service, and that TMC's proposal gives promise that its objective may be achieved. ATA feels that in view of the circumstances concerning the Preston grants and TMC's financial situation, the limited waiver asked by TMC is justified. AT&T and Western Tele-Communications, Inc., although they expressed serious reservations about the course of action proposed, stated that they would not object to the transitional solution TMC has proposed.

8. The remaining parties who filed comments opposed the proposal. Briefly, they argued that TMC entered into the arrangement with Preston with full knowledge of the possible risks involved, and that the Commission has no obligation to rescue the venture; that TMC's proposal to use private frequencies for common carrier purposes is undesirable, would set a bad precedent, and would be unfair to existing specialized common carriers. Nearly all questioned whether TMC would be able to convert the system to common carrier frequencies,

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[4] The 6575–6875 MHz band is allocated in the Safety and Special Radio Services; it is not available to common carriers. See Sections 2.106 and 93.2 of the Rules.

[5] Under existing rules, not only motor carriers, but also local governments, right-of-way companies, and entities whose rates and services are regulated may share the use of microwave systems licensed in the Safety and Special Radio Services. See Section 93.4 of the Rules.

as promised; others felt that the proposal is procedurally defective; and, at least one of the parties claimed TMC has not shown the need for the service, and urged that the request be dismissed.

9. We have considered TMC's request and the comments of the parties and have concluded that the petitioner has shown sufficient justification for special relief. Obviously, TMC may apply for authorizations under Part 21 of our rules to operate a radio system as a specialized common carrier under the policies adopted by the Commission in Docket 18920, *Specialized Common Carrier Service*, 29 FCC 2d 870 (1971). Further, as we have indicated, Preston, the licensee for the microwave system in question, agrees to TMC's proposal and we expect Preston to propose to assign its rights under its authorizations to TMC [6]. Thus, the only issue of substance is whether we should waive the rules to permit the petitioner to use radio spectrum allocated in the Safety and Special Radio Services for common carrier purposes during a five-year interim period.

10. We believe that the circumstances here justify waiver of our rules, but only to the extent necessary to permit TMC to apply for the authorizations to operate the existing communication system. We authorized the microwave system initially because we found a need to accommodate important communications requirements, at least in the motor carrier industry. Preston's comments and those of the American Trucking Association indicate that those requirements still exist, and TMC plans to provide for them. Finally, it seems to us that TMC's proposal which looks toward resolution of the regulatory uncertainties involved will enhance the likelihood that the existing and functioning 480-mile microwave system may fulfill some of these requirements at an early date. Accordingly, we will waive the appropriate rules to allow TMC to apply for authorizations to operate the radio system now authorized to the Preston Trucking Company for a period of five years. We will also allow TMC to apply for authorizations to add facilities on private frequencies which are necessary to connect prospective users to the microwave systems,[7] to the extent we now permit Preston to do so. See *Preston Trucking Co., Inc.* 31 FCC 2d 766 (1971).

11. TMC's proposal to expand its system on Safety and Special frequencies from Albany, New York, to Boston, Massachusetts, and from Ivy Hill, Pennsylvania, to Washington, D.C., is another matter. TMC proposes to construct and operate these extensions to the system on private frequencies because of the investment it has already made in clearing frequencies, acquiring sites, and for engineering the proposed extensions. However, the Commission's decision in the Preston case precludes such extensions prior to the conclusion of the proceedings in Docket 19309, *Preston Trucking, Inc., supra*, et 773. Further, as a number of those commenting point out, it may be more difficult to

[6] We want to be clearly understood that we do not view TMC's May 30, 1973, request as an "application." Rather, we view it as a petition for waiver of the rules preliminary to filing applications. Therefore, we expect TMC to follow our application procedures in order to obtain authorizations to operate the system. TMC has indicated that it fully understands the requirements in this respect. Thus, the argument advanced by MCI and others concerning TMC's alleged failure to comply with application procedures is clearly misplaced.

[7] Any authorizations for connecting facilities granted during the five-year period will be for the balance of the period, so that all authorizations for the system will expire at the same time.

find common carrier frequencies over these routes in five years (when the time comes for conversion) than it is now. Therefore, it appears only prudent to design these routes initially for common carrier frequencies rather than accept the substantial risk of having to move existing stations or make other expensive alterations five years hence. Thus, with respect to these planned facilities, we are of the opinion that TMC has not made a persuasive enough showing to warrant using frequencies allocated for private use in the Safety and Special Radio Services. Accordingly, this aspect of TMC's request will be denied.

12. Finally, as we have mentioned, TMC proposes to reserve fifty percent of the circuit capacity for those entities eligible to share microwave facilities authorized in the Land Transportation Radio Services. While we appreciate TMC's expression of an obligation to the trucking industry, and while we understand that Preston's and ATA's concurrence is based in part on this proposal, we do not believe that the creation of a preferred class of customers is permissible.[8] Therefore, although we anticipate that TMC will make every effort to meet the reasonable requests for service by the trucking industry, we will expect it to accept all requests for service on a "first come-first served" basis, even if such requests may require additional capacity.[9]

13. If the approach that we have outlined is satisfactory to TMC, and to Preston, TMC should file, within 60 days of the release date of this opinion and order, applications (on Forms 401 and 403) for each existing microwave station now licensed to Preston, together with a proposal from Preston to assign its rights under its authorizations to TMC. Pending action on such applications, the facilities may continue to be operated pursuant to the existing arrangements and authorizations. In the meantime, TMC should prepare appropriate tariffs which should be filed so as to become effective within seven calendar days after the grant of common carrier radio authorizations. In addition, we expect TMC to begin taking reasonably prompt action looking towards coordinating common carrier frequencies, re-engineering and rerouting the system where necessary, and obtaining authorizations, so that conversion of the system would be accomplished within the five-year period.

14. We want to emphasize that we are simply adopting a transitional solution dictated by the facts in this particular case, and our decision is to be so considered. As such, our decision would not affect adversely the interest of any party to this proceeding, nor would it create a precedent for the use of safety and special frequencies by common carriers, as many of the comments have argued. Finally, the decision here in no way resolves the policy issues in Docket 19309. The permissible arrangements for the shared use of private microwave systems will be determined in that proceeding, although the issues raised there with respect to the Preston grants may become moot.

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[8] Section 202(a) of the Communications Act states that "it shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

[9] Any additional capacity, of course, will be expected to be accommodated on common carrier frequencies.

15. We will now consider the other matter before us. As we have mentioned, Preston is not now allowed to extend its backbone system, but it may add "spurs" and other connecting facilities to enable truckers along the route to tie into the microwave system. *Preston Trucking Co.*, 31 FCC 2nd 766 (1971), 776. On May 3, Preston filed applications for a station to be located on the premises of one of the prospective users, Eastern Freightways, at Carlstadt, New Jersey, for the purpose of connecting the truck terminals at Carlstadt, with Preston's backbone system station in Jersey City. MCI Telecommunications Corporation has filed a petition to deny these applications, arguing, among other things, that this is not a connecting facility but an extension of the Preston main system and, as such, is not permitted under the Commission's decision. We believe that the facilities proposed in the instant applications are entirely consistent with the Commission's decision to permit Preston to add facilities for connecting purposes. Accordingly, the MCI petition will be denied.

16. In view of the foregoing, IT IS ORDERED That the above-described request filed by TMC on May 30, 1973, IS GRANTED to the extent indicated in the foregoing opinion and IT IS DENIED in all other respects. IT IS FURTHER ORDERED, That the petition to deny the applications of the Preston Trucking Company, Inc., described above, filed by MCI Telecommunications Corporations IS DENIED, and that the applications WILL BE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-696

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
"PETITION FOR RECONSIDERATION" SEEKING REVERSAL OF COMMISSION ACTION GRANTING WAIVER OF SECTION 73.658(k)(3) FOR THE WILD KINGDOM PROGRAM FOR 1973-74 (PETITION OF NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS)

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 17, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON AND H. REX LEE DISSENTING.

1. The Commission here considers a "Petition for Reconsideration" timely filed on April 13, 1973, by National Association of Independent Television Producers, Inc. (NAITP) against the Commission's action of March 13, 1973, granting waiver of the "off-network" provisions of the prime time access rule (Section 73.658(k)(3) for the *Wild Kingdom* program for the 1973-74 broadcast year, thus permitting that program to be shown during prime time on top-50-market affiliated stations without counting toward the three permissible hours of network and off-network material during prime time each evening.[1] We also consider here a brief opposition to this "Petition" filed by Mutual Insurance Company of Omaha, the owner and distributor of this program.

2. The petition for reconsideration is premised chiefly on the assertion that grant of the waiver for this coming year "constituted an error of law and/or an arbitrary and unreasonable deviation from the policy which it proposed to implement." The argument concerns what we meant in the policy enunciated last fall that, pending over-all decision in Docket 19622, the general evaluation of the prime time access rule, we would not normally grant further waivers for entire "off-network" program series, thus, as we later expressed it, preserving the *status quo* pending complete consideration and decision in the Docket 19622 proceeding. NAITP's position essentially is that our action granting the continuation, for 1973-74, of the waiver previously granted for *Wild Kingdom* for 1971-72, is not consistent with the policy as properly applied, nor with maintenance of the *status quo*,

[1] *In the Matter of Mutual Insurance Company of Omaha*, 40 FCC 2d 81, 26 R.R. 2d 1597, FCC 73-296, released March 20, 1973.

which should mean here, as elsewhere, enforcement of a particular regulation *as written* until it is affirmed, revoked or modified. Thus, while we were not required to terminate existing waivers, neither should we grant new ones—either for new programs or extensions of waivers previously granted. It is claimed that our policy had some obvious benefits—creating a situation where the rule as modified in the ultimate decision in Docket 19622 could go into effect fully without outstanding impingements on it, preventing preliminary, partial determinations from influencing the ultimate decision, and avoidance of creating dubious precedents—advantages lost by actions such as the continuation of the *Wild Kingdom* waiver. Also, it is claimed, this action simply compounds one of the problems presented by these situations in 1972—that of dealing with individual programs rather than any kind of joint or combined consideration—and will simply serve as a precedent for further requests, and in particular for further requests for "repeat" waivers (e.g., *National Geographic*).

3. It is also argued that the action here is bad in that it covers a period which presumably will be *entirely* after the basic decision as to the rule, and thus appropriate for treatment in that decision rather than separately, and will have an undesirable influence on the distribution of programming for that season. In sum, it is urged, the waiver *alters* the status quo, rather than maintaining it, and in such a way as to guarantee the perpetuation of the very problems which the decision in Docket 19622 will be intended to resolve.

4. The Mutual of Omaha opposition makes essentially the same arguments urged by that party earlier, that the *status quo* being maintained includes the waiver for *Wild Kingdom*, of which this is simply a continuation rather than a new matter.

DISCUSSION AND CONCLUSIONS

5. Upon consideration of these submissions, we adhere to the decision previously reached and the views discussed (see *Mutual of Omaha*, FCC 73-296, pars. 11-16): that the *Wild Kingdom* matter involves a *continuation* of a waiver rather than a new one, and therefore is consistent with maintenance of the *status quo* pending completion of our consideration of the whole "prime time access rule" matter. Our views are set forth fairly completely in the earlier decision, and need not be repeated here.

We also note the point made in footnote 9 of that discussion, that in a sense failure to act on the request now, and thus making distribution of the program more difficult, would be regarded as a form of negative "pre-judgment". That, of course, is even more true in June than it was in March. It is also to be noted that we have recently scheduled oral argument in the over-all proceeding, Docket 19622, for late July, meaning that a decision may not be reached until September. It would hardly be appropriate to postpone the present matter until that time, just before the new season.

6. In view of the foregoing, and for reasons stated in our earlier decision, the "Petition for Reconsideration" filed on April 13, 1973 by National Association of Independent Television Producers (NAITP) seeking reconsideration and reversal of our action granting waiver for the *Wild Kingdom* program, is denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

42 F.C.C. 2d

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F.C.C. 73R–272

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RADIO GENEVA, INC., GENEVA, N.Y.	Docket No. 19709 File No. BPH–7645
BUCCANEER BROADCASTING LTD., GENEVA, N.Y. For Construction Permits	Docket No. 19710 File No. BPH–7821

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1973; Released July 25, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Radio Geneva, Inc. (Radio Geneva), and Buccaneer Broadcasting Ltd. (Buccaneer), each requesting a construction permit for a new FM broadcast station to operate on channel 269A at Geneva, New York. The applications were designated for consolidated hearing by Commission Order, FCC 73–295, 38 FR 7842, published March 26, 1973. Presently before the Review Board is a petition to enlarge issues, filed April 10, 1973, by Radio Geneva,[1] seeking addition of a staff adequacy issue and requesting modification of an existing financial qualifications issue against Buccaneer.[2]

STAFF ADEQUACY ISSUE

2. Supported by the affidavit of Robert R. Michael, General Manager of Radio Station WGVA, Geneva, New York, Radio Geneva alleges that Buccaneer's proposed staff of five persons is inadequate to effectuate its proposed programming format. Noting that Buccaneer proposes to broadcast ten hours and forty minutes of news,[3] five hours of public affairs programming and two and one-half hours of all other programming (exclusive of entertainment and sports) per week, Michael concludes that a staff of six and one-half persons would be required in order to minimally effectuate the proposal. In opposition, both Buccaneer and the Broadcast Bureau argue that the re-

[1] Also before the Review Board are the following related pleadings: (a) Broadcast Bureau's comments, filed April 25, 1973; (b) opposition, filed April 30, 1973, by Buccaneer; and (c) reply, filed May 4, 1973, by Geneva.

[2] The financial issue specified by the Commission in its designation Order, *supra*, reads as follows:

1. To determine, with respect to the application of Buccaneer Broadcasting Ltd.:

(a) Whether the applicant can demonstrate the availability of advertising revenues in the amount of $25,000, and if not, whether the applicant has available other sources of funds to meet its requirements;

(b) Whether, in light of the evidence adduced under the preceding issue, the applicant is financially qualified.

[3] Additionally, petitioner notes that the applicant's announcers will be responsible for gathering regional and local news, which will constitute 30% of the time devoted to news.

quested staffing issue must be denied because Radio Geneva has not pleaded with the sufficiency and specificity required to support the addition of the issue. In reply, Radio Geneva contends that an issue is nevertheless required inasmuch as Buccaneer, aside from indicating the number of hours each proposed employee would work, has failed to adequately specify the duties and responsibilities which would be attributed to each of the proposed employees. Petitioner cites *WHCN, Inc.*, 25 FCC 2d 673, 19 RR 2d 1017 (1970), to support its request.

3. In the Board's view, petitioner's allegations are insufficient to warrant the imposition of the requested staffing issue. Radio Geneva predicates its request on little more than a recitation of Buccaneer's proposed programming, coupled with the bald assertion that the proposed staff is inadequate. While Buccaneer proposes to devote some eighteen hours a week to news, public affairs and "other" programming, there is nothing inherently improbable in Buccaneer's plan to operate an FM facility with a staff of five full-time employees. The Board has long held that where effectuation of a proposal is not inherently improbable, it will not specify an adequacy of staff issue absent specific allegations demonstrating that the proposal cannot be effectuated. *Cf. Martin Lake Broadcasting Co.*, 23 FCC 2d 721, 19 RR 2d 277 (1970); *Jay Sadow* (*WRIP*), 27 FCC 2d 248, 20 RR 2d 1171 (1971); and *Fred Kaysbier*, 19 FCC 2d 636, 17 RR 2d 389 (1969). This holding is clearly applicable in this case. Moreover, although Buccaneer did not specify all of the precise duties of each of its proposed employees, the applicant has indicated that it proposes to devote a considerable and, on its face, not unreasonable amount of employee hours (168) solely to the programming concerns of its 126 hour broadcast week. Accordingly, no issue is warranted.

FINANCIAL QUALIFICATIONS

4. In support of its request to enlarge the existing financial qualifications issue to encompass an inquiry into the reasonableness of Buccaneer's cost estimates, Radio Geneva alleges that Buccaneer either has made no provision for, or has underestimated, certain pre-operation and first year operating costs.[4] The inclusion and accuracy of estimating these expenses is particularly crucial to assuring the continuing operation of the applicant, petitioner asserts, since Buccaneer is proposing to rely on substantial advertising revenues during the first year of operation, citing *Ultravision Broadcasting Company*, 1 FCC 2d 544, 5 RR 2d 343 (1965). Further, Radio Geneva recommends that Buccaneer be called upon to specify with particularity what equipment it proposes to purchase and what equipment it has on hand.

[4] Specifically, petitioner alleges that Buccaneer has made no provision for the following costs: construction of mobile equipment for remote broadcasts, legal services, installation of equipment and engineering, social security payments, gasoline and transportation, entertainment and promotion, postage and printing, music and record library, technical supplies and equipment, and loan repayments to the Bank of Geneva and the Bogart Plumbing and Heating Company. Furthermore, Radio Geneva contends that Buccaneer has underestimated the following expenses: remodeling of studio and transmitter site, salaries, utilities, equipment payments, office supplies and equipment and insurance. The Bureau also alleges that Buccaneer has underestimated its equipment payments by two installments.

In this connection petitioner alleges that there is considerable confusion as to Buccaneer's precise proposal because of unexplained variances between the applicant's several financial amendments and original proposal.[5]

5. The existing financial issue will be enlarged to encompass inquiry into Buccaneer's cost estimates with respect to equipment payments, legal expenses, and certain pre-operating expenses (specifically engineering and installation costs). The applicant's assertion that its equipment payment schedule is based upon an oral understanding with its equipment supplier that a thirty to sixty day deferral can be obtained does not adequately substantiate its claim that it need only estimate twelve monthly payments in its application. Absent a more definitive arrangement whereby Buccaneer is reasonably assured of a sixty day deferral, it must be assumed that more than twelve monthly payments will be due prior to the expiration of the first year of operation.[6] Further, Buccaneer's amendment filed October 20, 1972, fails to clearly establish the apportionment of funds for the additional legal expenses incurred as a result of this hearing, or for engineering and installation costs. These matters raise questions which warrant further inquiry during the hearing. Radio Geneva's allegations concerning other cost estimates have been satisfactorily answered by Buccaneer. As adequately explained by the applicant, its loan repayments will not commence during the first year of operation; its initial loan from the Bogart Plumbing and Heating Company will not become due and payable for some eighteen months after it receives a construction permit and it does not intend to draw on its bank loan until the third month of operation, thereby suspending repayment of either loan well into the second year of operation. Radio Geneva's remaining allegations are either speculative in nature[7] or are based upon an unwarranted comparison with expenses incurred by an existing station, in this case its own AM facility which is located in the same market. The Commission requires more than a showing that a proposed station is advancing cost estimates which are lower than other on-going and established stations in the same or similar markets;[8] on the contrary, a petitioner must raise a substantial question as to whether or not an applicant's cost estimates are unrealistic. This, Radio Geneva has failed to do. *Cf. Dowric Broadcasting Company, Inc.*, 37 FCC 2d 40, 25 RR 2d 92

[5] In two separate amendments, Buccaneer has scaled down both its equipment and financial proposals.

[6] As indicated in the application form (Form 301, Section III, p. 2, Item Ic), the Commission requires an applicant to include 14 monthly payments in its cost estimate if its first equipment payment is due upon delivery, 13 monthly installments if payment is due in 30 days, and 12 monthly payments if payment is due in 60 days.

[7] E.g. Buccaneer has explained that it will rent rather than construct appropriate studio space; accordingly, there is no basis for concluding that the $1,000 estimate for remodeling a studio would be required, let alone inadequate.

[8] In contrast to the costs incurred by petitioner's AM station, Buccaneer avers that its first year operating expenses were not underestimated since the principals of Buccaneer will use their personal automobiles, take reduced draws as payment, utilize existing office equipment and furniture and spend minimal monies on entertainment and promotion. With regard to miscellaneous expenses, Buccaneer also explains that the social security payments were included in the salary budget and that the postage and printing allocations were included in the office supplies and equipment category. Moreover, Mr. Shoupe will contribute his music album collection to the station for use as a music library.

(1972); *Salem Broadcasting Co., Inc.*, 37 FCC 2d 115, 25 RR 2d 68 (1972).[9]

6. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed April 10, 1973, by Radio Geneva. Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects; and

7. IT IS FURTHER ORDERED, That Issue 1, as specified in the designation Order, IS AMENDED to read as follows:

To determine, with respect to the application of Buccaneer Broadcasting Ltd.:

(a) The estimated costs for legal fees, equipment payments, and pre-operation equipment and installation costs during the first year of operation, and whether such estimates are reasonable;

(b) Whether the applicant can demonstrate the availability of advertising revenues in the amount of $25,000, and if not, whether the applicant has available other sources of funds to meet its requirements, including any additional funds necessary in light of evidence adduced pursuant to issue (a);

(c) Whether, in light of the evidence adduced under the preceding issue, the applicant is financially qualified.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[9] Also see *Viking Television, Inc.*, 17 FCC 2d 823, 16 RR 2d 123 (1969); *California Stereo, Inc.*, 39 FCC 2d 401, 26 RR 2d 887 (1973).

F.C.C. 73-810

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF RADIO STATION KGVL, INC., LICENSEE OF RADIO STATION KGVL, GREENVILLE, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released August 1, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated August 29, 1972, addressed to Radio Station KGVL, Inc., the licensee of Radio Station KGVL, Greenville, Texas and (2) the licensee's response of September 22, 1972 to the Notice of Apparent Liability.

2. Station KGVL, Greenville, Texas is authorized to operate with power of 1,000 watts in September from 6:00 a.m. to 6:30 p.m. Central Standard Time (7:00 a.m. to 7:30 p.m. Central Daylight Time) and in October from 6:30 a.m. to 5:45 p.m. Central Standard Time (7:30 a.m. to 6:45 p.m. Central Daylight Time). During the remainder of its unlimited hours the station is authorized to operate with power of 250 watts.

3. The Notice of Apparent Liability for forfeiture issued in this proceeding indicated that in violation of Section 73.52(a) of the Rules of the Commission and the terms and provisions of the station license the station was operated with excessive power either before sunrise or after sunset, or both, on 44 days between September 1, 1971 and October 31, 1971, ranging from 8.34 per cent to 312 per cent in excess of authorized power as detailed in Appendix I and Appendix II which are attached hereto and made a part of this Memorandum Opinion and Order.

4. In its response to the Notice of Apparent Liability, the licensee requests full remission or reduction in the amount of forfeiture and states:

> First, let me assure the Commission that our violations were not willful. Having been at KGVL in management for 25 years we are proud of our record in abiding by F.C.C. rules and never having a problem with our renewals.
>
> In retrospect there was negligence on my part in not daily checking our logs. My big mistake was delegating authority for this important work and not checking on those who were assigned the task. Also, we had two new employees who did not properly follow instructions. Being in a small market in the shadow of

Dallas, we have found it most difficult to secure experienced and properly trained employees for the salaries we can afford to pay. Experienced engineers with 1st class licenses are so difficult to obtain that we utilized a 1st class engineer on a contract basis, therefore he was not always able to be at the station.

Following notification of our violations, new procedures were put into effect to assure me that this will not occur again. All announcers are periodically informed by memorandum, which they must initial, that any excessive or low power must be reported immediately to me or another executive if I am out of town. Also, each day's logs are inspected daily by me to be sure readings are proper. Since we know that obsolete and improperly operating equipment were part of our problem we have ordered a new transmitter and all other control room equipment. Because of the new equipment, we are building new facilities for the station. In addition we have retained an engineering firm to assist us with our technical problems.

Additionally, the licensee alleges that the Greenville area has been adversely affected economically by reductions in the aero-space industry and that the money it might have to pay for the forfeiture might be better used to buy new equipment and to have more skilled employees.

5. In response to the Notice of Apparent Liability the licensee does not deny the violations cited in the Notice but states that they were not willful. We find that the licensee of Station KGVL repeatedly failed to operate the station as set forth in the station license and repeatedly violated Section 73.52(a) of the Commission's Rules in that the station was operated with power in excess of that authorized as set forth in Appendix I and Appendix II hereof. Having found the violations to have been repeated it is unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. This proceeding is confined to those violations which occurred within one year prior to the date of the issuance of the Notice of Apparent Liability for forfeiture.

6. We considered the licensee's financial condition prior to adoption of the Notice of Apparent Liability in this proceeding and a reexamination thereof now does not provide reason for reduction in the amount of forfeiture. The licensee's other reasons given in support of its requests for total remission or reduction have been considered and we are not persuaded to grant either request. Licensees are expected to comply with Commission requirements and are responsible for the acts or omissions of their employees. *J. C. Johnson tr/as Lowndes Broadcasting Company*, 23 FCC 2d 91 (1970); *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). We have also stated that licensees will not be excused for past violations by reason of subsequent corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966).

7. In view of the foregoing, IT IS ORDERED, That Radio Station KGVL, Inc., the licensee of Radio Station KGVL, Greenville, Texas, FORFEIT to the United States the sum of two thousand dollars ($2,000) for repeated failure to operate Station KGVL as set forth in the station license and for repeated violation of Section 73.52(a) of the Commission's Rules. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Radio Station KGVL, Inc., the licensee of Radio Station KGVL, Greenville, Texas.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX I

OVER POWER OPERATION PRIOR TO AUTHORIZED INCREASE AT SUNRISE

Dates	Central daylight time (a.m.)	Power (watts)	Percent in excess	Dates	Central daylight time (a.m.)	Power (watts)	Percent in excess
9- 1-71	5:30	277	10.7		6:00	286	14.3
	6:00	277	10.7		6:30	289	15.5
	6:30	295	17.9	9-14-71	5:43	304	21.7
9- 2-71	5:30	277	10.7		5:59	295	17.9
	6:00	288	15.5		6:31	291	16.7
	6:30	292	16.7		6:58	291	16.7
9- 4-71	5:30	968	287	10-17-71	6:32	304	21.7
	6:00	985	294		7:00	304	21.7
	6:30	991	296	10-18-71	5:30	283	13.1
9- 6-71	5:30	277	10.7		6:00	289	15.5
	6:00	289	15.5		6:30	289	15.5
	6:30	301	20.4		7:00	289	15.5
9- 7-71	5:30	277	10.7	10-20-71	6:30	289	15.5
	6:00	289	15.5		7:00	289	15.5
	6:30	295	17.9	10-21-71	5:30	289	15.5
9- 8-71	5:30	295	17.9		6:00	295	17.9
	6:00	277	10.7	10-22-71	5:30	289	15.5
	6:30	271	8.34		6:00	283	13.1
9-10-71	5:30	283	13.1		6:30	289	15.5
	6:00	295	17.9	10-23-71	5:43	289	15.5
	6:30	307	22.9		6:00	295	17.9
9-11-71	5:30	285	14.3		6:30	295	17.9
	6:00	295	17.9		7:00	295	17.9
	6:30	289	15.5	10-24-71	6:51	304	21.7
9-13-71	5:30	301	20.4		7:00	304	21.7

APPENDIX II

OVER POWER—SUNSET UNTIL MIDNIGHT

Dates	Central daylight time (p.m.)	Power (watts)	Percent in excess
9-1-71	7:30-12:00	286	14.3
9-2-71	7:30-12:00	289	15.5
9-3-71	7:30-12:00	986	294.0
9-4-71	7:30-12:00	1031	312.0
9-5-71 through 9-10-71	7:30-12:00	289	15.5
9-11-71	7:30-12:00	301	20.4
9-12-71	7:30-12:00	289	15.5
9-13-71 through 9-30-71	7:30-12:00	289	15.5
10-1-71 through 10-8-71	6:45-12:00	289	15.5
10-9-71	6:45-12:00	314	25.4
10-10-71 through 10-15-71	6:45-12:00	289	15.5
10-16-71	6:45-12:00	311	24.2
10-17-71	6:45-12:00	364	45.6
10-18-71 through 10-21-71	6:45-12:00	289	15.5
10-23-71	6:45-12:00	304	21.7
10-24-71	6:45-12:00	289	15.5
10-25-71	6:45-12:00	283	13.1
10-26-71	6:45-12:00	273	9.52
10-27-71 through 10-29-71	6:45-12:00	283	13.1
10-31-71	6:45-12:00	283	13.1

F.C.C. 73–796

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SEE-MOR CABLE TV OF SIKESTON, INC., SIKESTON, MO. For Certificate of Compliance	CAC–532 (M0053)

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released August 1, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. In the captioned application for certificate of compliance, See-Mor Cable TV of Sikeston, Inc., proposes to add the distant signals of an educational station and two commercial independent television stations from St. Louis, Missouri to its existing cable television system at Sikeston, Missouri, a community in the Cape Girardeau, Missouri-Paducah, Kentucky-Harrisburg, Illinois television market (#69).[1] The application was opposed by Paducah Newspapers, Inc., licensee of Station WPSD–TV, Paducah, Kentucky.[2] Applicant has replied and has amended its application.

2. See-Mor currently carries the following signals:

WSIL–TV, Harrisburg, Ill. (ABC, Channel 3).
WPSD–TV, Paducah, Ky. (NBC, Channel 6).
WSIU–TV, Carbondale, Ill. (Educ., Channel 8).
WKMU, Murray, Ky. (Educ., Channel 21).
KFVS–TV, Cape Girardeau, Mo. (CBS, Channel 12).
WDXR–TV, Paducah, Ky. (Ind., Channel 39).

It proposes to add, pursuant to Section 76.65 of the Rules, the signals of educational Television Broadcast Station KETC, St. Louis, Missouri, a signal previously authorized by the Commission.[3] It also proposes, pursuant to Section 76.63(a) of the Rules as it relates to Section 76.61(b) and (c), to add the signals of two St. Louis independent stations, KPLR–TV and KDNL–TV. Microwave relay facilities are proposed to be used to obtain the three signals. WPSD–TV objects to the proposal because there are alleged procedural defi-

[1] The community of Sikeston has a population of 13,765, and See-Mor was serving 1814 subscribers as of January 1, 1972. The cable system commenced operations in July, 1971, and currently has 12 channels available for carriage of broadcast and access services. Of these channels, six are used for television signal carriage and one for automated program originations (a time-weather channel). In addition, nine FM stations are carried.

[2] See-Mor asserts that although WPSD–TV's "Petition to Deny" was filed pursuant to Section 76.27 of the Rules, it also requested special relief pursuant to Section 76.7 of the Rules and therefore should have been accompanied by a filing fee. However, we conclude that since the pleading was essentially an opposition, no fee was required. See Section 1.1116 of the Rules.

[3] Carriage of KETC was authorized pursuant to Section 0.289(c)(12) of the Rules on November 16, 1970, in connection with a petition for waiver of Section 74.1107 of the Rules (CATV 100–476).

104–005—73——7

ciencies in the application and because, in any event, the system should not be authorized to carry the proposed independent signals in view of the unique circumstances of this market.

3. With respect to the alleged procedural deficiencies in the application, WPSD–TV points out that applicant has failed to have its application signed by an officer of the corporation, copies of the application have not been made available for public inspection in the city of Sikeston, there is no indication of See-Mor's intent to satisfy local origination requirements, and there is no explanation by See-Mor of the way in which its proposal for access channel service is consistent with the requirements of the Rules. With its reply pleadings, See-Mor amended its application and corrected each of the points raised by WPSD–TV. The procedural arguments are, thus, moot.[4]

4. The substance of WPSD–TV's objection goes to the importation of the two distant independent stations. See-Mor carries this market's only commercial independent signal, UHF Station WDXR–TV, Paducah, Kentucky. In this instance, Section 76.63(a) of the Rules permits the system to carry two additional distant independent signals, subject to leapfrogging restrictions. There is no leapfrogging involved here. Consequently, absent other considerations, See-Mor's proposal is consistent with our rules.

5. WPSD–TV's basic argument is that the Commission's August 5, 1971 "Letter of Intent", FCC 71–787, 31 FCC 2d 115, shows the Commission's intention to prevent the economic harm done by importation of distant independent signals into markets whose unique composition makes them specially vulnerable to such importation. In particular, WPSD–TV cites Appendix B of the Letter, in which the Commission specifies 12 markets, one of which is the Cape Girardeau-Paducah-Harrisburg market, which "do not follow the usual pattern and where special treatment might, on further consideration, be appropriate." 31 FCC 2d 115, 147. WPSD–TV then presents information to demonstrate that unique factors and unusual patterns are present in the See-Mor case that require the "special treatment" which the Letter envisions. For instance, WPSD–TV asserts that the Cape Girardeau-Paducah-Harrisburg market is made up of "three relatively small-sized central cities, and its local stations, particularly the new UHF station (WDXR–TV), are therefore particularly dependent upon the accumulated aggregate of viewers and advertisers

[4] See-Mor pointed out, additionally, that when its application was filed on June 1, 1972 (Public Notice of June 12, 1972), there was no requirement that an officer sign the application, nor was there a requirement that the application be made available for public inspection in the community of the system, and that since the system had less than 3,500 subscribers, it was not required to engage in origination cablecasting. (The procedural provisions discussed were not part of the Rules until the *Reconsideration of the Cable Television Report and Order* was adopted on June 16, 1972, and by Public Notice dated September 14, 1972, FCC 72–825, applications filed prior to July 14, 1972 are not required to conform to them.) The amendment indicates that See-Mor will meet the origination cablecasting requirements of Section 76.201 once it has 3500 subscribers, and in addition will provide a public access channel and an education access channel at the time that it adds KPLR–TV and KDNL–TV.

located in the smaller communities and rural areas throughout the joint coverage areas." WPSD–TV places special emphasis on the fact that WDXR–TV is both new and licensed to one of the smallest cities in the United States that has a UHF station licensed to it. WPSD–TV concludes that given so "obviously tenuous" a UHF operation, the Commission "in light of the factors reflected in the 'Letter of Intent' . . . concerning an anomalous market such as this, should not mechanically apply the standards cited by . . . [See-Mor] relating to signal carriage in below top-50 markets". In this connection WPSD–TV asserts that the Letter of Intent is "controlling on the Commission's new CATV Rules".

6. The Commission's Letter of Intent has no "controlling" effect on the new cable television rules adopted in the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143; it was intended only as a preliminary indication of what the rules might contain. While recognizing that special relief might be appropriate in certain market situations where distant signal importation might pose unique problems, the Commission deleted prior specific reference to particular markets, stating in Paragraph 113 of the *Cable Television Report and Order*.

> In connection with our special relief provisions, we note that in our August letter we designated certain markets where it appeared that special treatment to restrict distant signal carriage might have to be considered. We are no longer singling out these cases because the inclusion of substantial exclusivity protection for syndicated programming limits the impact of cable on local television service and is a new factor that must be taken into account. We are leaving unusual situations to petition for special relief, but there must be a substantial showing to warrant deviation from the go, no-go concept of the Rules.

In the Commission's judgment, the exclusivity protection established by the new cable television rules has reduced the probability that harm of the kind anticipated by the Letter of Intent will result from distant independent signal importation into markets of the Cape Girardeau-Paducah-Harrisburg type. However, the possibility remains that special relief of the kind sought by WPSD–TV may be granted in conjunction with a "substantial showing." The "substantial showing" standard was clarified in *Gerity Broadcasting Company*, FCC 72–651, 36 FCC 2d 69, in which we held that such showings must "contain specificity of fact, showing injury to the public" before special relief could be granted. WPSD–TV's pleadings fall short of this requirement, and are insufficient to warrant special relief. In addition, we note that not only has WDXR–TV interposed no objection to See-Mor's carriage proposal, but the station actually notified the system, in a letter dated December 22, 1969, that it "hope[s] you are successful with the Commission in obtaining this right" to carry KETC and KPLR–TV (attachment to "Reply to Petition to Deny").

In view of the foregoing, the Commission finds that grant of the subject application for certificate of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned application for certificate of compliance (CAC–532) filed by See-Mor Cable TV of Sikeston, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Petition to Deny" filed by Paducah Newspapers, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R–275

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN BROADCASTING CO. (WGHP–TV), HIGH POINT, N.C. For Renewal of Broadcast License	Docket No. 18906 File No. BRCT–574
FURNITURE CITY TELEVISION CO., INC., HIGH POINT, N.C. For Construction Permit for New Television Broadcast Station	Docket No. 18907 File No. BPCT–4302

MEMORANDUM OPINION AND ORDER

(Adopted July 25, 1973; Released July 30, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is a petition, filed May 30, 1973, by Southern Broadcasting Company (WGHP–TV) (Southern)[1], which seeks the addition of three issues inquiring into the alleged misrepresentation of Furniture City Television Company, Inc. (Furniture City), and collaterally, the modification of the existing Section 1.65 issue against the same applicant. Southern notes that on May 18, 1973, Furniture City sought leave to amend its application to reflect the fact that one of its stockholders, J. H. Froelich, Jr., was resigning from his position as director in Knob Creek of Morgantown (Knob Creek), Morgantown, North Carolina. Southern contends that Furniture City intentionally misrepresented to the Commission in that petition that the precise date of Mr. Froelich's resignation was not immediately available since he was out of the country. Petitioner maintains that the exact date of the resignation was, and is, immediately available from Knob Creek's corporation records.[2] In light of this, Southern also contends that Furniture City has violated Section 1.65 of the Rules by not timely reporting the change in its stockholder's business interests until May 18, 1973.[3]

2. The Board will deny Southern's petition. As Furniture City and the Bureau correctly note, Southern has failed to comply with the

[1] Also before the Board for consideration are: (a) Broadcast Bureau's opposition, filed June 6, 1973; (b) opposition, filed June 13, 1973, by Furniture City; and (c) reply, filed June 20, 1973, by Southern.

[2] Since Furniture City failed to furnish the date of Mr. Froelich's resignation, its May 18 petition for leave to amend its application was denied by an Order of the Presiding Judge released June 20, 1973, without prejudice to a subsequent refiling when complete information is available. (See paragraph 2 *infra*.)

[3] In support of its allegations, petitioner submits an affidavit from Mr. Joseph M. Morrissey, an attorney associated with the law firm representing Southern in this proceeding, which states that Mr. Morrissey was told by the president of Knob Creek, during a telephone conversation on May 24, 1973, that the exact date of Mr. Froelich's resignation was in the corporate records and that Mr. Froelich "resigned sometime back last quarter."

requirements of Section 1.229(c) of the Rules which requires that petitions be supported by an affidavit of a person having personal knowledge of the alleged facts. In any event, even if the actual date of Mr. Froelich's resignation had been available in Knob Creek's records, this would not raise a substantial question of misrepresentation by Furniture City since the applicant indicated in its May 18 petition that it would inform the Commission of the precise date of resignation upon Froelich's return.[4] Finally, Southern's request to modify the Section 1.65 issue is based on surmise and speculation since it does not provide the effective date of Mr. Froelich's resignation.[5] Moreover, although it appears from Furniture City's June 21 petition that the resignation was not reported until approximately one month after the expiration of the time limit set forth in Rule 1.65, the delay was relatively short, petitioner has supplied no motive to conceal the relevant facts, and the Board fails to see any decisional significance in Froelich's resignation.

3. Accordingly, IT IS ORDERED, That the petition to enlarge and modify issues, filed May 30, 1973, by Southern Broadcasting Company (WGHP–TV) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[4] Furniture City stated in its petition that:
Since Mr. Froelich is presently out of the country, the precise date of his resignation is not immediately available. It will be supplied when Mr. Froelich returns.

[5] The Board notes that Furniture City filed a new petition on June 21, 1973, for leave to amend its application to reflect the fact and date of Froelich's resignation from Knob Creek.

F.C.C. 73-788

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2 OF THE COMMISSION'S RULES AND REGULATIONS TO CONFORM, TO THE EXTENT PRACTICABLE, WITH THE GENEVA RADIO REGULATIONS, AS REVISED BY THE SPACE WARC, GENEVA, 1971	Docket No. 19547

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. The Commission, on February 14, 1973, adopted a Report and Order in Docket No. 19547 which, in part, amended Part 2, Section 2.106 of the Commission's Rules by adding footnote NG 105 which pertained to the 11.7–12.2 GHz band. The Report and Order in the aforementioned Docket was published in the Federal Register on March 1, 1973 (38 FR 5502), corrected on April 12, 1973 (38 FR 9228), and revised the Table of Frequency Allocations to conform, to the extent practicable, with the Geneva Radio Regulations, as revised by the Space World Administrative Radio Conference in Geneva, 1971.

2. A Petition for Reconsideration of the Commission's action in adopting footnote NG 105 in Docket No. 19547 was timely filed by CML Satellite Corporation (CML) on March 26, 1973. An Opposition to the Petition was filed by the Association of Maximum Service Telecasters (AMST) on April 16, 1973, and a Reply to the Opposition was filed by CML on April 26, 1973. Essentially, CML requested deletion of footnote NG 105, which states (as adopted):

> In the band 11.7–12.2 GHz, assignments in the Broadcasting Satellite and Fixed Satellite Services will not be made pending further Order of the Commission.

AMST's opposition to the CML petition was based on its concern for the broadcasting satellite service, and the fact that deletion of NG 105 would, in the absence of more definitive information concerning the broadcasting satellite service, open the way for fixed-satellite service in the entire 11.7–12.2 GHz band. CML states, in its Reply to the Opposition comments, that such opposition was based principally on the basis that such action (i.e. deletion of NG 105) would permit assignments in the Broadcasting Satellite service without further policy consideration by the Commission.

3. CML's petition is based on a desire to proceed with an application which had been filed over two years ago for use of the frequencies in connection with the domestic satellite system it proposes and because, as it alleges, "of the enormous harm to CML and the potential uses of its domestic satellite system."

4. From the beginning, the Commission saw the 11.7–12.2 GHz band as one important to the broadcasting satellite service. In the Notice of Proposed Rule Making in Docket 19547, adopted July 14, 1972 and released on July 26, 1972, which was published in the Federal Register on August 4, 1972 (37 FR 15714), we said in paragraph 11:

> It should be noted that the WARC imposed no power flux density limit in this band with respect to either broadcasting satellites or fixed satellites and no limits are proposed in our national rules. It is in this band that a domestic broadcasting-satellite service might logically be expected to develop—if we are to have one. It is conceivable that the fixed-satellite service would be used initially for the distribution of broadcasting program material and evolve with time into a community or direct-to-the-home broadcasting-satellite service. It is perhaps more conceivable, unless steps are taken to preclude it, that the fixed-satellite service would not take that course, but would be used for conventional fixed-satellite service and develop to a stage where the entire band and the preferred orbital positions were being used, to the virtual exclusion of a broadcasting-satellite service.

We are still of that opinion. In fact, we would now like to emphasize the importance of there being no flux limits in this band and point out that it is the lowest frequency band allocated to Broadcasting satellites that has no flux limit. As such, it is a highly desirable band for these satellites, that, by their very nature require high flux densities in contrast with fixed-satellite systems that do not require a high flux density and moreover, have other bands available to them.

5. Despite the comments of CML, we are still of the opinion, as set forth in paragraph 17 of the Report and Order in Docket No. 19547, that "system parameters and demands for either service are not yet clear." Only a portion of the necessary components and subsystems have yet reached the experimental or developmental stage; and the effects of propagation on system design and performance are still unsettled. Further, we know little of overall commercial and operational requirements for this band. We are therefore not yet ready to arrive at any conclusions concerning the ultimate disposition of the band. Nonetheless, we now favor its interim use by fixed-satellite systems.

6. In this connection, however, it should be pointed out that we are extremely uncertain as to when broadcasting satellites will be developed in the United States. Recent developments, including reductions in both Government and industry funded programs, indicate that such development will take at least as long as the decade or so predicted earlier. If such indications are correct, we should not preclude the band from being used during this period of time. Only two communications satellite programs will be continued as a result of the recent NASA decision: one is the ATS/F satellite which will have the capability of transmitting television to community-type receivers in the 2500 MHz region (for experiments with, among other U.S. users, the

Federation of Rocky Mountain States) and at around 890 MHz (for subsequent experiments with India); the other is the joint Canada/NASA Communications Technology Satellite ("CTS"). This satellite is scheduled for launch in 1975 and will use a 200 watt tube being developed especially for this program to transmit television signals in the band 11.7–12.2 GHz. Receiving antennas as small as two feet in diameter will be tested with this satellite. Experimental satellites like these will provide technical and operation experience that will be useful in planning for follow-on systems. We should emphasize that full account of the needs of CTS will be taken and that there need be no adverse impact on this satellite by any fixed-satellite systems that would be permitted under the revised footnote NG 105, described herein. Further, it is possible, indeed foreseeable, that, if broadcasting satellites are developed, they will evolve, at least in part, from Fixed Satellite Systems operating in the 11.7–12.2 GHz band. This is a likely outcome because, as the number of earth stations in a system increases, it is more economical to use higher power satellites which permits the use of less expensive earth stations—in other words, a broadcasting satellite system. Accordingly, to bring about this evolution, the interim use of the band by fixed satellite service systems should be encouraged.

7. At the same time, the systems that develop the technology should not make the transition to new systems impossible by their continuing occupancy of the band. They must be expected to evolve, convert or even relinquish occupancy of major portions of allocated spectrum to those new systems of equal or greater benefit to the public. We recognize that changes of which we are speaking will likely not take place, nor will they be required, for a considerable period of time. Moreover, those changes will not occur without notice.

8. Should systems in the fixed satellite service become operational in the next few years, it would be reasonable to assume that minor accommodation for broadcasting satellites (such as a change in orbital location) would probably not be required for perhaps a decade or so, and significant changes (such as giving up the use of specific frequencies), would probably not be required for much longer, if ever. In any event, plans for such broadcasting satellite systems, including their design, development, engineering, funding, and launch will likely be under consideration for a number of years. During this time, operators of fixed satellite systems would be able to alter the design of their systems for successive versions.

9. While we fully recognize the likely occurrence of the foregoing situation, our reluctance to concur totally with the request of CML stems from the fact that this is the lowest band in the radio spectrum (and therefore the most desirable) which has been allocated internationally for the broadcasting satellite service with no limitation on power flux density. Further, it is difficult to foresee where, in the event the band becomes saturated with domestic fixed satellite systems, an alternative band could be made available especially in view of the regional and international agreements required.

10. Finally, because the United States was one of the principal advocates of an allocation for a broadcasting satellite service at the

1971 Space WARC, the Commission, as one of the principal developers of the national position, is deeply committed to retaining a viable allocation for the service.

11. Thus, while we understand the aim of CML to utilize the 11.7–12.2 GHz band for their proposed fixed satellite system with no restrictions, we are not disposed to simply remove the footnote which is the subject of their petition. Instead, we will amend the wording of the footnote to read as follows:

> Pending adoption of specific rules concerning sharing of the band 11.7–12.2 GHz between the Broadcasting Satellite and Fixed-Satellite Services, systems in those Services may be authorized on a case-by-case basis subject to the condition that adjustments in certain system design or technical parameters (including but not limited to orbital location, channel use, etc.) may become necessary during the system lifetime in order to accommodate use of the band by systems of the same or other service.

12. Accordingly, IT IS ORDERED, pursuant to Sections 4 and 303 of the Communications Act, That footnote NG 105 to Section 2.106 of the Commission's Rules and Regulations IS AMENDED as reflected in the attached Appendix effective September 7, 1973.

13. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by CML IS GRANTED to the extent reflected herein and in all other respects IS DENIED.

14. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

In Section 2.106, footnote NG 105 is amended to read as follows:

§ 2.106 Table of Frequency Allocations

* * * * * * *

NG 105 Pending adoption of specific rules concerning sharing of the band 11.7–12.2 GHz between the Broadcasting Satellite and Fixed-Satellite Services, systems in those Services may be authorized on a case-by-case basis subject to the condition that adjustments in certain system design or technical parameters (including but not limited to orbital location, channel use, etc.) may become necessary during the system lifetime in order to accommodate use of the band by systems of the same or other service.

* * * * * * *

F.C.C. 73-769

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Letter of Inquiry to
SUBRINK BROADCASTING, INC., OF GEORGIA,
STATION WPCH-FM, ATLANTA, GA.
Concerning Allegation of Sale of Advertising Using a Combination Rate

JULY 18, 1973.

SUBRINK BROADCASTING, INC., OF GEORGIA
Radio Station WPCH(FM),
2203 La Vista Road NE.,
Atlanta, Ga.

GENTLEMEN: This is with reference to the Commission's letter of inquiry of December 15, 1972, and your reply dated December 19, 1972, concerning an allegation that you and the licensee of WGST had been selling advertising using a combination rate.

In response, you state that the Blair Company represents WPCH (FM) and WGST which are licensed to separate entities, that each has its own rate card, that any combination of the two is merely the addition of the two rate cards, and that there is no discount for buying the two stations in combination. You state further that there is no requirement that the stations be purchased in combination and that you recall only one combination sale since you commenced the practice in June. You explain that WGST and WPCH(FM) are programmed for different audiences and that there is no local agreement between you and the licensee of WGST. You attach a letter from John Blair and Company stating in part as follows:

> There may be a confusing factor involved as far as terminology is concerned. The word combination has a connotation of selling with a discount . . . rather than the true meaning which is being able to offer an advertiser two stations within a market place that can deliver his target audience which he can buy through one salesman rather than through two salesmen. So, to answer the above questions . . .
>
> 1. Yes, we do offer the advertiser the opportunity of buying two stations in a given market through the source of one salesman.
>
> 2. We do not offer a discount of the purchase of these two stations together.
>
> 3. The advertiser can—if he so desires—buy FM alone, or AM alone.
>
> With a request for the Atlanta market, all of our salesmen would submit avails in the following manner:
>
> a. Pricing and availabilities for the AM station, as well as cost efficiency of audience delivered by this AM station.
>
> b. He submits—separately—the availabilities and pricing of the FM station, as well as cost efficiency of audience delivered by this FM station.
>
> c. He submits the two stations together (in combination) in terms of availabilities, the cost efficiency of the two stations' audience, and the pricing, which would be the total of the AM pricing and the FM pricing.

The Commission's policy as to combination advertising rates is set forth in the Public Notice adopted January 30, 1963, in which we stated that combination rate agreements or practices by independent stations serving the same area raise serious questions under the policies underlying the anti-trust laws (15 U.S.C. 1), conflict with established Commission policy, and are contrary to the public interest.

Stations WPCH(FM) and WGST are independently owned stations, and the files reveal that Station WPCH(FM), Decatur, Georgia, provides a city grade service signal to Atlanta, Georgia, and that Station WGST, Atlanta, Georgia, provides primary service to the residential areas of Decatur both day and night. Considering all the circumstances in this case, we believe that the two stations serve the same area.

You state that there is no requirement that the stations be purchased in combination and that there is no local agreement between you and the licensee of Station WGST, but you acknowledge that your national sales representative uses a combination rate in selling advertising to be broadcast on WPCH(FM) and WGST. We conclude that this practice of offering a combination rate is in violation of our policy, even if there is no local agreement or requirement that the station be purchased in combination, or whether or not a discount is offered.

In view of the foregoing, it is requested that within twenty days you state what action you have taken to discontinue the practice.

Chairman Burch absent.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

F.C.C. 73-797

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REQUEST FOR ISSUANCE OF TAX CERTIFICATE FOR SALE OF INTEREST IN A CABLE TELEVISION SYSTEM PURSUANT TO SECTION 76.501(a)(2) OF THE COMMISSION'S RULES BY TELEVISION WISCONSIN, INC. Re Cable Television Systems Serving Madison and Platteville, Wis.	File No. CTAX-14

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released August 1, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. In *Second Report and Order in Docket No. 18397*, 23 FCC 2d 816 (1970), *modified*, *Memorandum Opinion and Order in Docket 18397*, 39 FCC 2d 377 (1973), the Commission adopted Section 76.501 (originally designated Section 74.1131) of the Commission's rules which, *inter alia*, prohibits cross ownership, operation, control, or interest of a cable television system with a local television broadcast station and requires divestiture where necessary to eliminate such existing proscribed cross-relationships.[1] In paragraph 16 of the *Second Report and Order*, *supra* at 823, the Commission indicated that the "involuntary conversion" provision of Section 1033 of the Internal Revenue Code would apply. Subsequently, the Commission held that Section 1071 [2] of the Internal Revenue Code should apply to divestitures of cable television systems pursuant to Section 76.501 of the rules and that in appropriate cases of such divestitures the Commission would issue tax certificates which the transferors could submit to the Internal Revenue Service. *Cosmos Cablevision Corporation*, 33 FCC 2d 293 (1972). The Commission has issued ten such certificates.

2. On June 1, 1973, Television Wisconsin, Inc., licensee of Broadcast Station WISC-TV, Madison, Wisconsin, filed a "Request for Tax

[1] Section 76.501 provides, in pertinent part: "(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: . . . (2) a television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers . . ."

[2] Section 1071 of the 1954 Internal Revenue Code provides that, "If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy or the adoption of a new policy by the [Federal Communications] Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the stockholder so elected, be treated as an involuntary conversion of such property within the meaning of Section 1033."

Certificates Under Section 1071 of the Internal Revenue Code" (CTAX–14) with respect to two transfers: (1) the transfer of Television Wisconsin's 50 percent interest in All Channel TV, Inc., which owns 75% of Complete Channel TV, Inc., which operates a cable television system at Madison, Wisconsin; and (2) the transfer of Television Wisconsin's 50 percent interest in Platteville TV Corp., which operates a cable television system at Platteville, Wisconsin.

3. With regard to its sale of stock in All Channel TV, Inc., Television Wisconsin states the following: (a) In 1965, Complete Channel TV, Inc., received a franchise to operate a cable television system at Madison, Wisconsin. At that time, Television Wisconsin, Inc., owned 50 percent of All Channel TV, Inc., which in turn owned 75 percent of Complete Channel TV, Inc. (b) After the Commission adopted Section 76.501 (then Section 74.1131) of the rules, Television Wisconsin began negotiations for the sale of its interest in the Madison franchise in order to comply with the rule. (c) On September 25, 1971, Television Wisconsin transferred its 50 percent interest in All Channels TV, Inc., to its existing "partners" in the venture, some other local individuals, and TeleCommunications, Inc., a major cable television system operator, in return for cash only. (d) None of the acquiring entities then held any interests in television broadcast stations which place a predicted Grade B signal over Madison. (e) The disposition was solely and entirely in accordance with and in order to comply with the Commission's policy prohibiting cross interests between co-located cable television systems and broadcast television stations.

4. With regard to its sale of stock in Platteville TV Corp., Television Wisconsin states the following: (a) In 1970, Television Wisconsin owned 50 percent of Platteville TV Corp., which for several years had operated a cable television system in Platteville, Wisconsin. The Platteville Telephone Company owned the remaining 50 percent. (b) After the Commission adopted Section 76.501 (then Section 74.1131) of the rules, Television Wisconsin began negotiations for the sale of its interest in the Platteville system in order to comply with the rule. (c) On October 1, 1971, Television Wisconsin transferred its 50 percent interest in Platteville TV Corp. to the Platteville Telephone Company in return for cash only. (d) Platteville Telephone Company has no interest in any television broadcast company which places a predicted Grade B signal over Platteville. (e) The disposition was solely and entirely in accordance with the Commission's policy prohibiting cross-interests between co-located cable television systems and broadcast television stations.

5. The effect of Section 76.501 is that, if a cable television system which has a cross interest with a co-located television broadcast station proposes to carry the signal of any television station (*i.e.*, performs a key function by which the term "cable television" is defined) there must be a divestiture of the interest in either the cable television system or the broadcast station. Although the Madison system did not begin actual operations until December, 1971 (according to the system's Form 325 for the year 1971 on file with the Commission), after the transfer by Television Wisconsin of its interest in the system, the

Commission has held that "the issuance of a tax certificate would be appropriate where the licensee of a television broadcast station transferred to another its rights, under a municipal franchise, to construct and operate a cable system *not yet in existence* whose service area (once the system began operations) would be within the predicted Grade B contour of the system." *Plains Television Corp.*, 36 FCC 2d 614, 615 (1972). Here, the franchise was issued in 1965, well before the 1970 Commission Order which promulgated the new rule; hence, when Television Wisconsin transferred its ownership interest in All Channel TV, Inc., it transferred its interest in rights under a municipal franchise to build a cable television system at Madison. Such transfer was appropriate to effectuate a new Commission policy with respect to ownership and control of cable television systems and television broadcast stations.

6. The sale by Television Wisconsin of its 50 percent interest in the Platteville system to the Platteville Telephone Company in October, 1971, raises an issue not present in the Madison situation and apparently one with which the Commission has not dealt. In January, 1970, the Commission promulgated rules (Sections 63.54–.57, 64.601–.602) prohibiting telephone common carriers from furnishing cable television service in their operating territory either directly or indirectly through an affiliate except when, for good cause shown, the Commission grants a waiver. *Final Report and Order in Docket No. 18509*, 21 FCC 2d 307, *petitions for stay and reconsideration denied, Memorandum Opinion and Order in Docket 18509*, 22 FCC 2d 746, *aff'd, General Telephone Co. v. United States*, 449 F. 2d 846 (1971). The rules became effective on May 1, 1970, but Note 3 to Section 64.601 states that the prohibition is effective on March 16, 1974, if the cable television service was being furnished on or before May 1, 1970. Since Platteville TV Corp. began operations prior to May 1, 1970, the Platteville Telephone Company presumably could retain its original 50 percent interest until March 16, 1974. However, when it purchased the remaining 50 percent interest of Television Wisconsin in October, 1971, Platteville Telephone increased its ownership of an affiliated cable television *after* the effective date of Section 76.604 of the rules. In three analogous cases, the Commission held that the "effective date" provision of Section 76.501 of the rules, similar in wording to Note 3 of Section 64.601, should be read as prohibiting increases of ownership interest during the grace period for divestiture. *Stauffer Publications, Inc.*, FCC 72–712, 25 P & F Radio Reg 111; *Kern Cable Co.*, 33 FCC 2d 823 (1971); *Gill Industries*, 33 FCC 2d 818 (1971).[3] We believe that Note 3 to Section 64.601 of the rules should likewise be read as prohibiting increases in the ownership interests which existed prior to May 1, 1971, during the four year grace period. However, we note that the three above-mentioned cases were decided after the date of the transaction here in question and there might have been some uncertainty until then on whether increases in ownership were permitted. Consequently, we do not feel that in this case the increase in the extent

[3] In each of the cases, however, the Commission granted a waiver of the rule because of the particular circumstances involved.

of cross-ownership by the Platteville Telephone Company should prevent the transferor, Television Wisconsin, Inc., from receiving a tax certificate for its divestiture of a prohibited cross interest. The ultimate date by which Platteville Telephone must divest its interest in the Platteville cable television system—March 16, 1974—is less than one year from now.[4] However, if Platteville Telephone should apply for a tax certificate after divestiture of its interest in the Platteville cable television system it will not be entitled to a tax certificate for that portion of its interest which it acquired after May 1, 1970. Nonetheless, it is clear that the sale by Television Wisconsin of its interest in the Platteville system was appropriate to effectuate new Commission policy with respect to ownership and control of cable television systems and television broadcast stations.

7. Television Wisconsin has brought to our attention one further issue which, although not directly related to the transactions for which tax certificates are sought, merits discussion here. In September, 1972, the Evening Telegram Company, which owns (directly or indirectly through the Morgan Murphy estate) 50 percent of Television Wisconsin's stock, sold its stock interests in a number of California cable television systems to TeleCommunications, Inc. (TCI). As a result of the sale to TCI, Evening Telegram now owns just over two percent of TCI's outstanding stock. TCI in turn owns 25 percent of the Madison cable television system raising the question of whether there is a prohibited cross interest between the Madison cable television system and the licensee of WISC–TV.

8. Television Wisconsin avers that Evening Telegram *effectively* owns only one-half of one percent of the Madison system.[5] However, we feel that Television Wisconsin's method of determining *effective* ownership (*i.e.*, two percent of 25 percent) is not what the rule is meant to imply. Section 76.501 of the rules does not mention *effective* ownership but, rather, speaks of *direct or indirect* ownership or control. TCI owns 25 percent of the Madison cable television system;[6] consequently, we presume that TCI *directly* controls the system. Since Evening Telegram owns two percent of TCI's outstanding voting shares,[7] Evening Telegram "indirectly . . . controls" the Madison cable television system within the meaning of Section 76.501 of the rules. Consequently, since Evening Telegram also directly controls WISC–TV, it appears that Evening Telegram presently violates the cross-ownership prohibition of Section 76.501. However, we do not feel that Evening Telegram's acquisition of TCI stock more than one year after Television Wisconsin's sale of its interest in the Madison system should prevent Television Wisconsin from receiving a tax cer-

[4] On July 3, 1973, the Commission denied petitions for a rulemaking proceeding to amend Part 64 of the rules to grandfather telephone company-affiliated cable television systems in operation on May 1, 1970, *Memorandum Opinion and Order*, FCC 73–717, —— FCC 2d ——.

[5] Note 3 to Section 76.501 of the rules states that, in applying the cross ownership prohibition to stockholders of a corporation which has more than 50 stockholders, "only those stockholders need to be considered . . . who directly or indirectly own 1 percent or more of the outstanding voting stock."

[6] The one percent limitation of Note 3 to Section 76.501 of the rules does not apply to TCI's interest in the Madison cable television system since the system has fewer than 50 shareholders.

[7] The one percent limitation of Note 3 to Section 76.501 of the rules does apply to Evening Telegram's interest in TCI, which has more than 50 shareholders.

tificate. Evening Telegram, however, not a party to the present proceeding, should seek a formal ruling from the Commission, petition for waiver, or take other appropriate steps to remedy the situation. Since there apparently is a violation of the Commission's rules, we intend to monitor the situation and take whatever steps are appropriate.

Accordingly, IT IS ORDERED, That the above-captioned "Request for Tax Certificate Under Section 1071 of the Internal Revenue Code" (CTAX-14) filed by Television Wisconsin, Inc., IS GRANTED and the tax certificate appended hereto will BE ISSUED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

Television Wisconsin, Inc., has reported to the Commission its sale on September 25, 1971, of its interest in All Channel TV, Inc., and its sale on October 1, 1971, of its interest in Platteville TV Corp. to effectuate compliance with Section 76.501 of the Commission's rules with respect to the ownership and control of cable television systems and television broadcast stations.

It is hereby certified that the transfers were necessary or appropriate to effectuate the Commission's new rules and policies prohibiting the cross-ownership, operation, control, or interest of a cable television system with a co-located television broadcast station (Section 76.501 of the Commission's rules, adopted June 24, 1970, *Second Report and Order in Docket 18397*, 23 FCC 2d 816, *modified*, *Memorandum Opinion and Order in Docket 18397*, 39 FCC 2d 377 (1973).

This certificate is issued pursuant to Section 1071 of the 1954 Internal Revenue Code.

In witness whereof, I have hereunto set my hand and seal this day of ———, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

104-005—73 — 8

F.C.C. 73-695

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (KERRVILLE-FREDERICKSBURG, TEX.)	Docket No. 18979 RM-1387

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 6, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSTAINING FROM VOTING; COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE, REID, AND WILEY CONCURRING IN THE RESULTS.

1. The Commission has before it for consideration the petition for reconsideration filed by United-Tecon, a joint venture, on July 20, 1972, directed against the Commission's Report and Order released on June 13, 1972, (FCC 72-504, 35 F.C.C. 2d 510) which denied the United-Tecon request for the assignment of Channel 2 to Kerrville-Fredericksburg, Texas, as a hyphenated assignment. An opposition to the petition for reconsideration was filed by Kingstip Communications, Inc., licensee of UHF Station KHFI-TV, Austin, Texas.

2. The United-Tecon proposal assumed the use of a highly directionalized antenna with a maximum to minimum radiation ratio in the horizontal plane of 60 dB in order to minimize impact on UHF service in nearby areas. The maximum ratio permitted for VHF stations under Section 73.685(e) of the Rules is 10 dB, so that use of such an antenna would have required a waiver. In the Report and Order, the Commission observed that it could not evaluate the antenna proposal with specificity until it was before it in the application stage; that there was no assurance that the petitioner would be the successful applicant for the channel if it was assigned; that in the past the greatest deviation that had been permitted by waiver of Section 73.685(e) was 39.4 dB; that United-Tecon stated its proposed directional antenna was based on test facility measurements; that such measurements were acceptable under ordinary conditions but unacceptable for the great deviation proposed and that the only proof of the proposal would be by measurement under actual operating conditions; that since this could not be done the proposal was an unreasonable one and the requested waiver would be denied; and hence, since the proposal was not technically feasible, the requested channel assignment would not be made.

3. Although the decision turned on lack of technical feasibility, the Commission also treated the "UHF impact" issue and was of the opinion that economic factors would likely cause the operation of a

Channel 2 station in Kerrville-Fredericksburg to be marginal at best. It indicated that there was a likelihood that the operator of such a station would seek to modify its highly directional operation to an omnidirectional one in order to gain additional revenues, and that a significant impact on UHF development in Austin (which has one VHF and two UHF stations) and possibly in other nearby areas might result from this.

4. United-Tecon, in its petition for reconsideration, contends (1) that the Commission's holding with respect to the request for waiver of Section 73.685(e) was wholly inconsistent with the relevant facts, and (2) the Commission's "dictum" with respect to UHF impact totally ignores the facts that should be controlling on that question.

5. Specifically, United-Tecon claims that the Commission's finding with respect to the waiver of Section 73.685(e) was based on two premises:

(a) That "the greatest deviation thus far permitted by waiver of Section 73.685(e) has been 39.4 db . . ." and

(b) That the measurements of a test antenna, "while acceptable under ordinary conditions, cannot be relied on where . . . a vast departure from [the Commission's] rule is involved."

United-Tecon asserts that the first determination as to the size of the departure from the permissible dB ratio is factually incorrect, because the WWVU–TV antenna (Morgantown, West Virginia) has a maximum to minimum ratio of 46 dB, and the KZAZ(TV) antenna (Nogales, Arizona) has a ratio of 56.5 dB.[1] It then avers that the latter two suppressions are "clearly well within the current state of the art," and that such departures have been authorized and are being employed by operating stations.

6. As to the Commission's finding that reliance cannot be placed on the measurements of a test antenna, United-Tecon contends that it flies in the face of the basic laws of science, because the validity of measurement data does not turn on the question of whether the data being measured falls within the parameters of a rule (or a minor departure therefrom). United-Tecon then contends that, assuming the validity premise to be true, it does not mean that its proposal cannot be effectuated. After construction, it claims, the operation can be measured by recognized techniques to insure that the specified radiation is not being exceeded. Thus, it is contended that the waiver of Section 73.685 (e) should have been granted.

7. Concerning the "UHF impact" question, United-Tecon contends that such impact must be judged on its directionalized proposal and not in the context of an assumed omnidirectional operation. Secondly, it is contended that the Commission ignored the fact that the three Austin stations have primary network affiliations which assure their viability.

8. United-Tecon points out that the Commission conceded that there is a need for television service at Kerrville-Fredericksburg and that

[1] This claim was originally made in the reply pleading filed by United-Tecon on February 9, 1971. A further analysis of the claim does indicate that we had previously authorized a departure of 46 dB for the KZAZ antenna, as more fully set forth in paragraph 10, *infra*.

Channel 2 is available for assignment there. It strongly urges the Commission to take into account the fact that the two Austin UHF stations are network affiliated and this factor is far more important than exclusion of VHF competition. Finally, it points out that the Commission, in accordance with the *WCOV* case [2], must balance its UHF impact policy against competing policies and that the Court noted that the policy is not to be looked upon as an inflexible across-the-board barrier to a VHF assignment. Based on the foregoing, United-Tecon concludes that its proposed assignment should be made rather than waste the VHF frequency since the need for television service has been shown.

9. The Kingstip opposition states that the holdings in the Commission's Report and Order were eminently reasonable with regard to the two technical grounds that United-Tecon set forth in its Petition for Reconsideration and which it contends were not a sound basis for denying the waiver. Kingstip notes that of two waivers of Section 73.685(e) heretofore granted for over 40 dB ratio, neither was as great as 60 dB, and most waivers have been for less than 40 dB. It also notes that scale model measurements are inconclusive in such critical situations. Kingstip also states that the Commission's assessment of the facts concerning UHF impact was reasonable because the Commission necessarily had to consider the economic viability of the proposed VHF station.

10. The Commission has considered the petition for reconsideration filed by United-Tecon and is of the opinion that its Report and Order should be reaffirmed. The Commission has carefully analyzed the waivers granted for UHF Station WWVU–TV and VHF Station KZAZ (TV) and has concluded that, based on best available data, the WWVU–TV ratio is 30 dB and the KZAZ(TV) ratio is 46 dB. The permissible ratios for UHF and VHF stations as contained in Section 73.685(e) are 15 dB and 10 dB respectively; thus the respective departures are 15 dB (WWVU–TV) and 36 dB (KZAZ(TV)). The departure in this case would be 50 dB, which is a much more significant departure because the radiated signal multiplies much greater than as in an arithmetic progression as the size of the departure from the ratios permitted by the rules increases. To illustrate the latter principle, the magnitude of the departure of the rules is that departures of 15, 36 and 50 dB represent multiplying the allowed radiated signal intensity by factors of 6, 63 and 316, respectively. As to the United-Tecon contention that rejection of scale model data flies full in the face of the basic laws of science, all that need be said is that the Commission must satisfy itself that such an antenna suppression ratio can be maintained. Where a departure is so great, as here, such data are inconclusive.

11. The *WCOV* case, which is cited by United-Tecon, involved a situation whereby a VHF station was expanding its Grade B contour so that it involved a 3% increase in Grade B overlap. The Commission found that this increase in overlap was minimal, the station expanding its radiation was a weaker station (much weaker than WCOV, the complaining UHF station), the two stations had different network

[2] *WCOV, Inc.* v. *F.C.C.*, 464 F. 2d 812 (1972).

affiliations, and that although the complaining UHF station had suffered losses in the past, it was now in fairly stable financial condition. Based on these circumstances, the Commission found that there was not sufficient adverse impact on UHF Station WCOV to invoke the UHF impact policy. The Court affirmed the Commission's finding stating: "The UHF impact doctrine is, of course, a creation of the Commission and the Commission is free to give it such weight as it chooses, provided it is not arbitrary or irrational . . ." (citing *WLVA, Inc.* v. *F.C.C.*, 459 F. 2d 1286 (1972)). In its consideration of the UHF impact question as it affected the Austin UHF stations, the Commission necessarily had to consider the possible economic viability of the proposed highly suppressed Channel 2 operation at Kerrville-Fredericksburg, Texas. Past history of small market television stations is such that when those operations face financial difficulties that result in a marginal or a loss condition, the stations will seek to serve new areas. Directionalized television antennas can be modified for omnidirectional operation with relative ease and low expense especially when such an eventuality is taken into account prior to fabrication. A licensee on Channel 2 at Kerrville-Fredericksburg would be no exception to this possibility if it became apparent that survival could be achieved only by changing to omnidirectional to serve the city of Austin. Thus, based on the factors presented in this case, the Commission's action was reasonable and in no way arbitrary or irrational.

12. In view of the foregoing, IT IS ORDERED, That the petition for reconsideration of the Report and Order in this proceeding (Docket No. 18979) IS DENIED.

13. IT IS FURTHER ORDERED, That the termination of this proceeding IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-765

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
VALJON INC., SAN BERNARDINO, CALIF.
For an Advisory Opinion Regarding Proposed Combination Rates for Stations KMEN and KOLA-FM

JULY 18, 1973.

VALJON INC.,
Radio Station KMEN,
Post Office 1290,
SAN BERNARDINO, CALIF.

GENTLEMEN: This is in response to the letters of November 22, 1971, and January 31, 1972, submitted by your attorney, in which you request an advisory opinion regarding proposed combination rates by Station KMEN, San Bernardino, California, and KOLA(FM), San Bernardino, California.

It appears from the proposal that the stations will be priced separately as well as jointly (i.e., the local rates will be separate and national rates joint), and that advertisers will be offered a reduced rate to purchase time on both stations. Further, it appears that there will be no duplication of programming, that the principals have no common non-broadcast interests, and that there will be no other joint operations between the stations.

In support of the request, you state that KFXM and KDUO, San Bernardino, California, both licensed to KFXM Broadcasting Company, sell advertising to local and national advertisers at a group discount, and that this gives a competitive advantage. You state further that you will suffer severely in obtaining local and national advertising if you cannot compete on the same basis, and you contend that because of the competitive condition in San Bernardino, your proposal would not violate the Commission's policy set forth in the 1963 Public Notice concerning combination advertising rates.

In regard to the offering of combination rates by a licensee of more than one broadcast station in the same area (e.g., KFXM Broadcasting Company), the Commission has taken the position that such practices are not contrary to the public interest if the rate arrangement offered is voluntary (i.e., there is no requirement that the advertiser in order to place advertising on one station also must buy time on one of the licensee's other stations) and if the practice is not employed to advance unfairly a competitive position. See *Indianapolis Broadcasting, Inc.*, 22 FCC 421; *WBBF, Inc.*, 24 FCC 179 (1958), affirmed 266 F. 2d 922

(1959), *cert.* denied 361 U.S. 822. However, the Commission has recently issued a Notice of Inquiry and Notice of Proposed Rule Making seeking information as to whether it should continue to permit such combination rates.

Concerning your proposal, we do not agree that the 1963 Public Notice is not applicable. Stations KMEN and KOLA (FM) are independently owned stations licensed to the same city, and you propose a combination rate. As we stated in the 1963 Public Notice, combination rate agreements or practices of independent stations serving the same area raise serious questions under the policies underlying the antitrust laws (15 U.S.C. 1), conflict with established Commission policy, and are contrary to the public interest.

Considering all the circumstances in this case, we cannot approve your request to use combination rates.

Chairman Burch absent.

By Direction of the Commission,
Vincent J. Mullins, *Acting Secretary.*

F.C.C. 73R-278

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT-327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT-4465

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1973; Released July 31, 1973)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for consolidated hearing by Commission Order, FCC 72-767, 37 FCC 2d 266, released September 1, 1972. By Memorandum Opinion and Order, 39 FCC 2d 1077, 26 RR 2d 1456, released March 9, 1973, the Review Board added, *inter alia*, an issue against Las Vegas Valley Broadcasting Co. (Valley) to inquire into a proposed $1,000,000 bank loan to Valley from the Nevada State Bank.[1] In the same Memorandum Opinion and Order, the Board denied a requested issue to determine whether certain Valley stock subscribers were financially qualified to meet their respective stock subscription commitments.[2] Now before the Review Board is a ninth motion to enlarge issues, filed April 17, 1973, by Western Communications, Inc. (Western), again seeking the addition of an issue against Valley "to determine whether individual Valley stock subscribers are financially qualified to meet

[1] The issue, as specified by the Board, reads as follows:
To determine the terms and conditions of the proposed bank loan from Nevada State Bank relied upon by Valley, whether Valley can meet those terms and conditions, and whether, in light thereof, the proposed loan will in fact be available to it.

[2] The Board denied the requested issue on the grounds that "each now purports to rely upon a [bank] commitment for a personal loan to meet their respective subscription obligations; and have submitted personal balance sheets which afford the Board an opportunity to determine that the bank commitments are not unreasonable."

their respective proposed stock subscription and bank loan guarantee commitments".[3]

2. Western's motion is based on a February 22, 1973 letter from the general counsel of the Nevada State Bank which states that the bank has now conditioned its $1,000,000 bank loan to Valley on the applicant's stockholders executing personal guarantees.[4] [5] Western contends that the subsequent agreements by Valley's stock subscribers to guarantee the loan to Valley have jeopardized the personal loans relied upon by certain Valley stockholders which are required to fulfill their stock subscription commitments.[6] Petitioner concedes that it has no conclusive evidence that the personal loan letters from the three banks to the six Valley stock subscribers would be withdrawn or modified as a result of the endorsements [7] but, nevertheless, argues that the Board should add the requested issue in order to determine whether Valley may rely upon the loan arrangements of its stock subscribers. According to petitioner, the personal endorsements constitute the kind of obligation which a reasonably prudent bank would hold to materially affect the financial structure or liability of a potential borrower.[8] Thus, Western asserts, it is imperative to recognize that, not only would the stock subscribers individually be unable to repay a bank loan of $1,-

[3] Also before the Review Board are the following related pleadings: (a) supplement to ninth motion to enlarge issues, filed April 18, 1973, by Western; (b) Broadcast Bureau's comments, filed May 2, 1973; (c) opposition, filed May 2, 1973, by Valley; and (d) reply, filed May 14, 1973, by Western.

[4] The letter was incorporated in amendments to Valley's application, filed March 22, and April 6, 1973, accepted by the Administrative Law Judge, by Orders released April 5 and 24, 1973 respectively. Also included in the amendments are agreements between Valley and each Valley stock subscriber in which the subscribers agree to personally "endorse" the note for the loan from the Nevada State Bank.

[5] Although Western received its first notice of the Nevada State Bank's guarantee condition from an attachment to an out-of-order pleading filed by Valley on February 28, 1973, it was not until the amendments of March 22 and April 6 that Western knew that all Valley stockholders had agreed to give such an endorsement or guarantee. Therefore, the Board finds that good cause has been shown for the late filing.

[6] Three banks (Bank of Nevada, First National Bank, and Valley Bank of Nevada) have agreed to advance loans to six different Valley stockholders (Mr. Guy, Mrs. Scott, Dr. Kirshbaum, Mr. Babero, Dr. Fightlin, and Mr. Rogers) in the amounts of $5,000 $10,000, $20,000, $5,000, $5,000, and $26,250, respectively.

[7] Western attaches to its motion the letters it wrote to each of the banks which had indicated a willingness to advance loans to Valley's stock subscribers in order to ascertain the financial status of each stock subscriber in light of his subsequent endorsement. The unverified rseponses from the First National Bank and the Bank of Nevada indicate that the banks are unwilling to divulge any information with respect to any of their accounts without first obtaining the permission of the individual customer for release of the information by the bank or directed to do so by order of the court.

[8] In support of this contention, Western refers to an unverified letter from the First National Bank in which the correspondent states that it is within prudent banking practice to reevalnate any outstanding credit commitment, especially when information is revealed which would adversely change the financial structure or credit liability of a credit commitment recipient.

000,000, they would also be unable to do so on a collective basis.[9] The Bureau supports addition of an issue inquiring into the ability of Valley's stockholders to meet their respective proposed stock subscription commitments, absent a showing by Valley that the personal loans to its stockholders are still available.

3. In opposition, Valley claims that there is no basis for petitioner's contention that the agreement by Valley's stock subscribers to guarantee the loan to Valley somehow undercuts the personal loan commitments made to certain of those stockholders by the various banks. In support of this contention, Valley notes that one stock subscriber, James Rogers, (see footnotes 2 and 6, *supra*) has withdrawn his request for a line of credit from the First National Bank and has obtained a loan commitment from the Nevada State Bank, the prospective creditor of the applicant itself.[10] Furthermore, Valley argues that Western's claim that Valley's stock subscribers, individually and collectively, will be unable to meet their future guarantees must be dismissed as wholly speculative; according to Valley, there is no requirement in Commission proceedings that an applicant show that its individual stockholders have sufficient assets to support a guarantee of a loan to the applicant. In reply, Western urges that the new personal loan letter for Mr. Rogers is *prima facie* evidence that the First National Bank has in fact withdrawn Mr. Rogers' earlier personal loan commitment as a consequence of learning about the guarantee arrangement. More important, petitioner contends, Valley has made no showing that the personal loans to its stockholders have not been withdrawn or modified and therefore the requested issue is warranted.

4. Western's motion will be denied. The Review Board has already determined that there is no substantial question as to whether the subscribers in question are financially qualified to meet their respective stock subscription agreements, (see Memorandum Opinion and Order, 39 FCC 2d 1077, *supra*), and we find that Western's current allegations do not serve to alter this determination. Petitioner's contention that the secondary liability or personal guarantee agreements will somehow undercut the personal loans relied upon by certain Valley stockholders is based on conjecture and surmise and fails to meet the personal knowledge affidavit requirement of Section 1.229(c) of the Rules.[11] See *J. T. Parker, Jr.*, 7 FCC 2d 452, 9 RR 2d 897 (1967); *Pleasant Broadcasting Co.*, 22 FCC 2d 191, 18 RR 2d 689 (1970). Thus, Western has made no showing that the personal loan commitments have in fact been withdrawn or modified.[12] In any event, there is currently no question

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[9] In support of this allegation, petitioner attaches to its motion information showing that the total net current and liquid assets of the 17 Valley stock subscribers *as a group* amounts to only $236,068.

[10] This loan commitment from the Nevada State Bank was incorporated in an amendment to Valley's application, accepted by the Administrative Law Judge, by Order, FCC 73M-632, released May 29, 1973.

[11] The fact that the banks are unwilling to divulge any information concerning the status of the personal loans in light of the subsequent guarantees does not cure the deficiency.

[12] In this regard, it is noteworthy that Rogers has acquired a new personal loan commitment in the amount of $26,250, and that this loan was acquired subsequent to the applicant's loan commitment of $1,000,000 and from the same bank.

as to whether these banks are apprised of the guarantee.[13] Since it is incumbent upon Valley to inform the Commission of any significant changes in its financial posture,[14] the Board believes that it would not only be premature, but unwarranted, to add an issue inquiring into the financial capability of Valley's stock subscribers.

5. Accordingly, IT IS ORDERED, That the Ninth Motion to Enlarge Issues, filed April 17, 1973, by Western Communications, Inc. (KORK–TV) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[13] See footnote 7, *supra.*
[14] See Section 1.65 of the Commission's Rules.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
CITY OF NEWARK
For the Annual Financial Report for 1972 Filed by WNJR Radio Co.

JULY 30, 1973.

Mr. J. A. JUNGHERR,
Director of Finance, City of Newark, 920 Broad Street, Newark, N.J.

DEAR MR. JUNGHERR: This is in response to your letter of May 23, 1973 requesting on behalf of the City of Newark a copy of the annual financial report (FCC Form 324) filed for the year 1972 by WNJR Radio Company, the interim licensee of radio station WNJR, Newark, New Jersey.

As explained in your letter, in granting WNJR Radio Co.'s application for interim operating authority, the Commission ordered the new operators to reimburse the City of Newark for losses incurred in operating the station for the period July 29, 1971 through December 31, 1971. The Commission's Order of December 15, 1971 provides that the amount to be reimbursed is to be taken from WNJR Radio Co.'s operating profits and is not to exceed $50,000.

The financial report you request is not routinely available for public inspection under Section 0.457(d)(1)(i) of the Rules, and is filed by the licensee with the understanding that it will be maintained on a confidential basis unless a persuasive showing as to the reasons for inspection is made by the person requesting it. The procedures for requesting a record of this kind are set forth in Section 0.461 of the Rules, and pursuant thereto the Commission notified the licensee and invited comments on your request. Counsel for WNJR Radio Co. responded by letter of June 21, 1973 and opposed the granting of your request for the reason that the Commission had already advised the City of Newark that there were no profits from operating the radio station. Counsel for WNJR also opposed furnishing the City of Newark with a copy of the financial report if the inspection request were granted.

In view of the reimbursement provision contained in the Commission's Order described above, it is plainly necessary for the City of Newark to have access to the requested information. It is not sufficient that the Commission has examined the data and has advised the City that there were no operating profits for 1972. The City's auditors should be able to examine the data and reach their own conclusions.

Disclosure of the Form 324 information is thus necessary and only disclosure of the requested information to the City of Newark will put its auditors in a position to accurately assess the validity of the licensee's statement that it had no operating profits. It is also my view that the right to inspect the requested financial report would be of little value to you without the right to copy the information it contains. In view of the confidential nature of the data, however, you should limit the use of the data to the purpose for which it is being requested and make reasonable efforts to maintain its confidentiality with respect to competitors of WNJR Radio Co. Accordingly, your request for a copy of the requested Form 324 is granted.

Arrangements to inspect and obtain a copy of the Form 324 filed by the WNJR Radio Co. for the year 1972 should be made through my office subject to the licensee's right to seek review of my action pursuant to the procedures specified in Section 0.461(d)(2) of the Rules, 47 CFR § 0.461(d)(2).

Sincerely yours,

JOHN M. TORBET, *Executive Director.*

F.C.C. 73-787

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WSTE-TV, INC. (WSTE), FAJARDO, P.R. For Extension of Time Within Which To Construct WSTE-TV, INC. (WSTE), FAJARDO, P.R. For Modification of Construction Permit	Docket No. 18048 File No. BMPCT-5777 Docket No. 18049 File No. BMPCT-6029

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1973; Released July 31, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. The Commission has before it for consideration a petition for reconsideration, filed May 21, 1973, by WSTE-TV, Inc. (WSTE-TV), Fajardo, Puerto Rico. The petition requests reconsideration of our Memorandum Opinion and Order, FCC 73-403, 40 FCC 2d 773, released April 20, 1973. Oppositions to WSTE-TV's petition were filed June 1, 1973, by the Chief, Broadcast Bureau, and June 4, 1973, by respondent WAPA-TV Broadcasting Corporation (WAPA-TV), San Juan, Puerto Rico. WSTE-TV filed a reply to the oppositions on June 14, 1973.

2. The Memorandum Opinion and Order which we are now asked to reconsider denied WSTE-TV's application for review without specifying reasons therefor. Nevertheless, because we briefly explained our action in denying WSTE-TV's requests for permission to file two supplements to its application, the petitioner argues that its pleading is directed at the rejection of the two supplements, and is not barred by Sections 1.106(b) and 1.115(g) of our Rules.

3. We disagree. The rules bar petitions for reconsideration of actions which deny, without specifying reasons, applications for review, and cannot be circumvented by presenting additional matter in the form of belated and unauthorized supplements which require comments to be disposed of. In any event, WSTE-TV has advanced no sufficient reasons to warrant a finding that we erred in our previous determinations and no public interest considerations which call for a reconsideration of the matter on our own motion.

4. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed May 21, 1973, by WSTE-TV, Inc. (WSTE), Fajardo, Puerto Rico, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*